Supreme Court, U.S.
FILED

04 1 48 0 MAY 5 - 2005

OFFICE OF THE CLERK

No.

IN THE UNITED STATES SUPREME COURT

DOUGLAS B. MOYLAN,
Attorney General of Guam,
Petitioner,

vs.

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY,
by and through its
Board of Directors,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the Territory of Guam

---

Robert M. Weinberg*
Assistant Attorney General
Office of the Attorney General of Guam
287 West O'Brien Drive
Hagåtña, Guam 96910 • USA
(671) 475-3324 • (671) 472-2493 (Fax)

*Counsel of Record for Petitioner
Attorney General of Guam

QUESTION PRESENTED

Whether, in the absence of express authority from the United States Congress, the local Legislature for the Territory of Guam may alter, abridge, restrict or modify the powers and duties of the Attorney General of Guam, an Office established in the Organic Act of Guam by the United States Congress.

LIST OF PARTIES AND AFFILIATES

The Petitioner, Douglas B. Moylan, is the elected Attorney General of Guam, designated by the United States Congress as the "Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1).

The respondent is a public corporation and an autonomous instrumentality of the Government of Guam, called the A.B. Won Pat International Airport Authority, Guam. Title 12 Guam Code Annotated § 1102.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES AND AFFILIATES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 7

STATUTORY BACKGROUND 10

FACTUAL BACKGROUND 13

REASONS FOR GRANTING THE PETITION 18

I. THIS COURT HAS EXPRESSED ESPECIAL CONCERN WHEN NON-ARTICLE III TERRITORIAL COURTS INTERPRET FEDERAL LAW WITHOUT REVIEW BY ARTICLE III COURTS 18

II. THE SUPREME COURT OF GUAM HAS DEVIATED FROM THIS COURT'S PRECEDENTS IN SIMILAR CASES CONSTRUING THE ORGANIC ACT OF GUAM 21

III. THE SUPREME COURT OF GUAM'S OPINION DIRECTLY CONFLICTS WITH NINTH CIRCUIT U.S. COURT OF APPEALS DECISIONS INTERPRETING THE ORGANIC ACT OF GUAM 23

IV. THE SUPREME COURT OF GUAM ERRED IN FINDING AN IMPLIED GRANT OF AUTHORITY TO THE LOCAL LEGISLATURE OF THE TERRITORY OF GUAM THAT CONGRESS HAD ELSEWHERE, AND SO OFTEN, GRANTED ONLY EXPRESSLY 25

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

A.B. Won Pat Guam International Airport Authority v. Moylan, 2005 Guam 5, 2005 WL 291577 ..... passim

American Legion Post 279 v. Barrett, 20 N.E.2d 45 (Ill. 1939) 12

Bordallo v. Baldwin, 624 F.2d 932 (9th Cir. 1980) 7, 23, 24

Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098 (1943) 9, 19

Chase Manhattan Bank (National Association) v. South Acres Development Co., 434 U.S. 236, 98 S. Ct. 544 (1978) 18, 22

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236 (1976) 20

Food and Drug Administration v. Brown and Williamson Tobacco Corp., 529 U.S. 120, 120 S. Ct. 1291 (2000) ... 17, 27, 28

Gutierrez v. Ada, 528 U.S. 250, 120 S. Ct. 740 (2000) 22

Haeuser v. Dept. of Law, 97 F.3d 1152 (9th Cir. 1996) 7

In re: Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam, 2004 Guam 10, 2004 WL 1293239 (Guam 2004) 21

Jarecki v. G.D. Searle & Co., 367 U.S. 303, 81 S. Ct. 1579 (1961) 23

Nelson v. Ada, 878 F.2d 277 (9th Cir. 1989) 17, 23, 24

Ngiraingas v. Sanchez, 495 U.S. 182, 110 S. Ct. 1737 (1990) 21

Nguyen v. United States, 539 U.S. 69, 123 S. Ct. 2130 (2003) 18

People ex rel. Hartigan v. E & E Hauling, 607 N.E.2d 165 (Ill. 1992) 12

Territory of Guam v. Olsen, 431 U.S. 195, 97 S. Ct. 1774 (1977) ..... passim

United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999) .. 11

Whitman v. American Trucking Ass'n., 531 U.S. 457, 121 S. Ct. 903 (2001) 17, 27

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971) 9, 19

Federal Statutes

28 U.S.C. § 1257(a) 1
48 U.S.C. § 1421 7
48 U.S.C. § 1421a 2
48 U.S.C. § 1421g 2, 16
48 U.S.C. § 1421g(b) 17
48 U.S.C. § 1421g(d)(1) ..... passim
48 U.S.C. § 1421g(d)(2) 7
48 U.S.C. § 1422 15
48 U.S.C. § 1422c(a) 16

Guam Statutes

5 G.C.A. § 3102 ..... 3, 10
5 G.C.A. § 30101 ..... 4, 10
5 G.C.A. § 30103 5
12 G.C.A. § 1102 ..... ii, 6, 8, 11
12 G.C.A. § 1108 ..... 6, 8, 11

OPINIONS BELOW

The Opinion of the Supreme Court of Guam holding that an Act of Congress that amends the Organic Act of Guam and bestows common law powers upon the Congressionally established Office of the Attorney General and "Chief Legal Officer of the Government of Guam," 48 U.S.C. § 1421g(d)(1), may nevertheless be "subject to increase, alteration or abridgement" by the Legislature of Guam is *A.B. Won Pat Guam International Airport Authority v. Douglas B. Moylan, Attorney General of Guam,* 2005 Guam 5, ¶ 2, available at 2005 WL 291577. It also appears in the appendix of the Petitioner (Pet. App.) at A-1. The Decision and Order of the Superior Court of Guam granting mandamus relief to respondent A.B. Won Pat Guam International Airport Authority, directing the Attorney General of Guam to approve a legal services contract between GIAA and a private law firm, is unpublished and appears at Pet. App. B-1.

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Guam on February 8, 2005. This Court has jurisdiction to grant this Petition pursuant to 28 U.S.C. § 1257(a) as applied to the Territory of Guam by 48 U.S.C. § 1424-2. Prior to October 30, 2004, a petition for writ of certiorari from a final judgment of the Supreme Court of Guam would have been filed in the Ninth Circuit U.S. Court of Appeals. Section 22B of the Organic Act of Guam, 48 U.S.C. § 1424-2, was amended by Section 2 of Public Law 108-378, 118 Stat. 2206, 2208 (Oct. 30, 2004), which terminated the Ninth Circuit review by certiorari of decisions of the Supreme Court of Guam. While this Court has always been the court of last resort, it is now the only federal court

with jurisdiction to review decisions from local Territorial courts of Guam interpreting questions arising under federal law.

RELEVANT STATUTORY PROVISIONS

48 U.S.C. § 1421a

> Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The Government of Guam shall have the powers set forth in this Act, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the Government of Guam of any of its lawful powers. The Government of Guam shall consist of three branches, executive, legislative and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of Interior.

48 U.S.C. § 1421g(d)

> (1) Attorney General of Guam. The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam. At such time as the Office of the Attorney General of Guam shall next become vacant, the Attorney General of Guam shall be appointed by the Governor of Guam with the advice and consent of the legislature, and shall serve at the pleasure of the Governor of Guam.

(2) Instead of an appointed Attorney General, the legislature may, by law, provide for the election of the Attorney General of Guam by the qualified voters of Guam in general elections after 1998 in which the Governor of Guam is elected. The term of an elected Attorney General shall be 4 years. The Attorney General may be removed by the people of Guam according to the procedures specified in section 9-A of this Act or may be removed for cause in accordance with procedures established by the legislature in law. A vacancy in the office of an elected Attorney General shall be filled–

(A) by appointment by the Governor of Guam if such vacancy occurs less than 6 months before a general election for the Office of Attorney General of Guam; or

(B) by a special election held no sooner than 3 months after such vacancy occurs and no later than 6 months before a general election for Attorney General of Guam, and by appointment by the Governor of Guam pending a special election under this subparagraph.

SOURCE: § 29 of Act of Aug. 1, 1950 (Organic Act). Codified as 48 U.S.C. § 1421g. Subsection (d) added by "The Guam Organic Act Amendments of 1998," HR 2370, enacted Oct. 1998, sec. 2.

Title 5 Guam Code Annotated § 3102

There is within the Executive Branch of the Government of Guam, a Department of Law. The Attorney General is head of the Department of Law and the Chief Legal Officer of the Government of Guam. The Attorney General shall be appointed by

the Governor with the advice and consent of the Legislature for a four year term under the conditions set forth in § 30101 of this Title.

SOURCE: GOVERNMENT CODE § 5101, amended by P.L. 13-117 (December 27, 1975).

Title 5 Guam Code Annotated § 30101

(a) The Department of Law of the Government of Guam shall be administered by the Attorney General of Guam, who shall be elected by the people of Guam for a term of four (4) years.

* * *

(c) The Attorney General of Guam may be removed in the same manner as provided under the Organic Act of Guam for the removal of *I Maga'lahen Guåhan* [the Governor].

* * *

SOURCE: GOVERNMENT CODE § 7000; amended by P.L. 13-117, P.L. 13-133:4 (February 3, 1976). Repealed/reenacted by P.L. 25-44:3 (June 9, 1999). Compiler's Note: The Organic Act of Guam was amended to make the Attorney General, whether elected or appointed, the "Chief Legal Officer of the Government of Guam," and provided for the election of that officer as reflected in this Section. 48 U.S.C.A. § 1421g(d) as amended in October, 1998.

Title 5 Guam Code Annotated § 30103

Common Law Powers of Attorney General.

The Attorney General shall have, in addition to the powers expressly conferred upon him by this Chapter, those common law powers which include, but are not limited to, the right to bring suit to challenge laws which he believes to be unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, unless expressly limited by any law of Guam to the contrary. The Attorney General may permit attorneys admitted to private practice in Guam or licensed collection agents to collect accounts or other obligations owing to the Government of Guam, or to any agency or instrumentality thereof, if such procedure would be in the interest of the Government and expedite the collection of said account or obligation. Any agency or instrumentality not operating under yearly appropriations from the Legislature may retain counsel of its choice for the collection of obligations in the same manner as it may be permitted to retain counsel in other matters as permitted by its enabling legislation. Guam Memorial Hospital may permit the Attorney General or attorneys admitted to private practice in Guam and agents or licensed collection agents to collect accounts or other obligations owing to Guam Memorial Hospital.

SOURCE: GOVERNMENT CODE § 7002, repealed/reenacted by P.L. 13-117 (December 27, 1975); amended by P.L. 13-149:9 (June 26, 1976).

Title 12 Guam Code Annotated § 1102

There is within, a public corporation and an autonomous instrumentality of, the Government of Guam called the Antonio B. Won Pat International Airport Authority, Guam, to be further identified as the Won Pat International Airport Authority, Guam.

SOURCE: GOVERNMENT CODE § 62001, as enacted by P.L. 13-57 (September 26, 1975). Amended by P.L. 23-69:1 (February 29, 1976). Amended by P.L. 25-93:2 (December 29, 1999).

Title 12 Guam Code Annotated § 1108

(a) The Board may also appoint a treasurer, a comptroller and an attorney, all of whom shall serve at the pleasure of the Board. Their duties and compensation shall be fixed by the Board. The Board may appoint one assistant to any such office. Any of the said offices may be consolidated into one person.

* * *

(c) The Attorney, who must have been admitted to the practice of law in Guam, shall advise the Board and the Executive Director on all legal matters to which the Authority is a party or in which the Authority is legally interested, and may represent the Authority in connection with legal matters before the Legislature, boards and other agencies of the Territory or of the United States. The Attorney for the Authority shall represent the Authority in litigation concerning the affairs of the Authority.

SOURCE: GOVERNMENT CODE § 62007, as enacted by P.L. 13-57 (September 26, 1975).

STATEMENT OF THE CASE

The Organic Act of Guam, 48 U.S.C. § 1421 *et seq.*, functions as Guam's constitution. *See Haeuser v. Dept. of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996); *Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980); *GIAA*, ¶ 21, 2005 WL 291577, ¶ 21.[1] Prior to 2002, with Guam's first Congressionally authorized, *elected* Attorney General, the Office of Attorney General was a cabinet position, appointed by the Governor of Guam for a term of years, whose powers and duties were established by local law. In 1998 the United States Congress amended Guam's Organic Act to specifically establish the Office of Attorney General as a "constitutional" office, and to designate its holder as the "Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1).

The 1998 Congressional amendments expressly authorized the Legislature of Guam to determine how this constitutional officer was to be selected, i.e., whether by election or appointment. It further authorized the local Legislature to establish procedures by which the Attorney General may be removed for cause. 48 U.S.C. § 1421g(d)(2). Although the amendments authorized the local Legislature to determine by which method the Office of Attorney General may be filled, and to fix procedures by which the Attorney General may be removed, conspicuously absent was any provision authorizing the local Legislature to prescribe the powers and duties of the Office of Attorney General or to

[1] The difference between Guam's "constitution" and a State's constitution is that the electorate of a State may propose, ratify and amend its own constitution, whereas a literal "Act of Congress" is required to amend the Organic Act of Guam.

otherwise fix the functions, and define the parameters of that Office.

On November 7, 2002 Douglas B. Moylan was elected as the Territory of Guam's first Organic Act empowered Attorney General. Mr. Moylan took office on January 6, 2003. Shortly after taking office, the newly elected Attorney General informed all Government of Guam line and autonomous agencies that he was prepared to begin rendering legal services. In response to this letter, the Guam International Airport Authority ("Airport Authority" or "GIAA"), an autonomous agency and instrumentality of the Government of Guam, notified the Attorney General that its Board had decided to hire private counsel and would not recognize nor utilize the legal services of the Attorney General's office. As authority for the position that it could unilaterally hire its own counsel without the consent of the Attorney General, the Airport Authority cited its enabling legislation, 12 G.C.A. § 1102 and 12 G.C.A. § 1108 (a) and (c), which were passed over twenty years before Congress amended the Organic Act of Guam to provide that the Attorney General shall be the "Chief Legal Officer of the Government of Guam."

On March 3, 2003, the Attorney General filed a complaint for temporary and permanent injunction and for declaratory judgment in the District Court for the Territory of Guam against William R. Thompson, in his official capacity as Executive Manager of the Airport Authority. The complaint sought a declaration that "the designation of Chief Legal Officer in 48 U.S.C. § 1421g(d)(1) pre-empts any laws of Guam respecting the distribution of powers and responsibilities between the Attorney General of Guam and private counsel representing government agencies and departments, said Federal law being determined to be the supreme law of the land." Four days later, on March 7, 2003,

in response to the Attorney General's complaint for federal declaratory relief, the Airport Authority filed a Petition for Writ of Mandamus in the Superior Court of Guam. The Airport Authority sought to compel the elected Attorney General by mandamus to perform his "statutory" duty of approving the Airport Authority's contract with private counsel. Due to the pendency of the Airport Authority's petition in the Superior Court of Guam, the District Court abstained on April 1, 2003, citing the *Younger* and *Burford* abstention doctrines.[2] The District Court's abstention order is presently pending on appeal in the United States Court of Appeals for the Ninth Circuit and is scheduled for oral argument on May 11, 2005. Meanwhile, the Airport Authority's petition for writ of mandamus proceeded to judgment in local court.

The Superior Court of Guam rendered its Decision and Order on May 12, 2003, directing the Attorney General to approve as to form and content a legal services contract between GIAA and a private law firm. Pet. App. B-1. A final judgment was entered on January 30, 2004. Pet. App. B-1. That judgment was appealed by the Attorney General and upheld by the Supreme Court of Guam on February 8, 2005. Pet. App. A-1. In its opinion affirming the judgment of the Superior Court of Guam, the Supreme Court of Guam held that while the 1998 Congressional amendments to Guam's Organic Act "bestowed common law powers and duties upon the Attorney General of Guam[,] . . . those common law powers and duties may be subject to increase, alteration or abridgement by the Guam Legislature." *A.B. Won Pat Guam International Airport Authority v. Moylan* ("*GIAA*"), 2005 Guam 5, 2005 WL91577, ¶ 2. Pet. App. A-2. And in the last paragraph of its decision, the Guam Supreme Court held

---

[2] *See Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971); and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943).

"that the Attorney General, as Chief Legal Officer, is charged with all the powers and duties pertaining to the office at common law, except insofar as they have been expressly restricted or amended by statute." *Id.* ¶ 67. Pet. App. A-37. This petition for writ of certiorari follows.

STATUTORY BACKGROUND

In 1998 Congress amended the Organic Act of Guam, and established the Office of Attorney General as a "constitutional" Office, not merely authorizing Guam's local Legislature to establish the Office, but establishing the Office itself. *See* 48 U.S.C. § 1421g(d)(1). Previously, the Office of Attorney General was a creature of local law, *see, e.g.*, 5 G.C.A. § 3102, subject to appointment and removal by the Governor, and indeed dissolution altogether by the Legislature of Guam.[3] Now, however, federal law has established the Attorney General as the "Chief Legal Officer of the Government of Guam."

A comparison of the local statutes existing in 1998, with the 1997 bill introduced by Guam's Delegate to Congress Robert Underwood, and with the final legislation passed by Congress as 48 U.S.C. § 1421g(d)(1), reveals three critical points: First, a "constitutional" (Organic Act) amendment was unnecessary to create and empower the position of Attorney General, because the position and its duties already existed in local law. Second, the legislation originally introduced by Delegate Underwood would have

[3] Previously, 5 G.C.A. § 3102 provided: "There is within the Executive Branch of the Government of Guam, a Department of Law. The Attorney General is head of the Department of Law and the Chief Legal Officer of the Government of Guam. The Attorney General shall be appointed by the Governor with the advice and consent of the Legislature for a four year term under the conditions set forth in § 30101 of this Title."

permitted the local Legislature, as opposed to Congress, to create the Office of Attorney General, and the Legislature could have set the position's powers and duties. And third, the final version of the law Congress passed reserved no authority to the local Legislature to alter or abridge the powers and duties of the Office.

Nonetheless, on February 8, 2005 the Supreme Court of Guam held "that the 1998 Amendments bestowed common law powers and duties upon the Attorney General of Guam [but] that those common law powers and duties may be subject to increase, alteration or abridgement by the Guam Legislature." *A.B. Won Pat Guam International Airport Authority v. Moylan* ("*GIAA*"), 2005 Guam 5, 2005 WL 291577, ¶¶ 2, 62. Pet. App. A-2, A-34. The Court held "that the Attorney General, as Chief Legal Officer, is charged with all the powers and duties pertaining to the office at common law, except insofar as they have been expressly restricted or modified by statute." *Id.* ¶ 67. Pet. App. A-37.

It is of no small consequence that 12 Guam Code Annotated § 1108(c) vests the attorney for the GIAA Board and Executive Director with total authority to advise and represent the Airport Authority in all its legal affairs.[4] By

[4] The local law creating the Airport Authority was passed in 1975 and authorizing it to retain its own counsel, more than 20 years before the 1998 Congressional Amendments establishing the Office of Attorney General as Chief Legal Officer of the Government of Guam in the Organic Act. In passing the 1998 amendments to the Organic Act, Congress is presumed to have had knowledge of 12 G.C.A. § 1102. *See United States v. Hanousek*, 176 F.3d 1116, 1121 (9th Cir. 1999). Nonetheless, Congress did not exempt the Airport Authority, or any other autonomous agency, from the term "Government of Guam" as defined in 48 U.S.C. § 1421g(d)(1). The necessary conclusion is that Congress intended to have one coherent legal policy to be established by the Attorney General, who is the Chief Legal Officer for all Government of Guam agencies and instrumentalities.

holding that the Legislature of Guam is authorized to alter, abridge, restrict or modify the Attorney General's common law powers and duties established by Congress, the local courts have exalted local law over a Congressional enactment, and turned Guam's Organic Act on its head. The practical consequence of the Guam Supreme Court's holding is that Congress may, by amending the Organic Act, create a "constitutional" office within the Government of Guam, but the Legislature of Guam may, by local law, alter, abridge, restrict or modify the nature and function of that office to the degree that it renders the Congressional enactment superfluous, if not meaningless.[5]

There are no limitations expressed in the Organic Act upon the term "Chief Legal Officer" with respect to the powers, duties and functions of the Attorney General of Guam. Neither the Legislature of Guam, nor any other branch of government, is expressly authorized by Congress to intrude upon or otherwise usurp or diminish the powers and duties of the Office of Attorney General. The holding of the court below – that the Legislature of Guam could, by local act, alter or abridge the Congressionally established powers and duties of the Office of Attorney General, and remove from the purview of the Chief Legal Officer of the Government of Guam superintendence of the legal affairs of the agencies and instrumentalities which comprise that government – defies the Congressional enactment and is due to be reversed.

---

[5] While the local Legislature may increase or add to the powers and duties of the Attorney General, given the "constitutional" status of the Office now, it may not diminish or reduce those powers. *Cf. American Legion Post 279 v. Barrett*, 20 N.E.2d 45, 51 (Ill. 1939) ("the General Assembly may not take away from a constitutional officer the powers or duties given him by the constitution"); and *People ex rel. Hartigan v. E & E Hauling*, 607 N.E.2d 165, 170 (Ill. 1992) ("although the legislature may add to the Attorney General's common law powers, it may not detract from them").

FACTUAL BACKGROUND

This case involves the intent of Congress in amending Guam's Organic Act in 1998, establishing the Office of Attorney General, designated by Congress as the "Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1). Prior to the Congressional amendments to the Organic Act, Guam already had a statutorily authorized Attorney General, subject to local legislative prescription and gubernatorial appointment, oversight and control. The question for Congress to consider was whether the Attorney General should continue to be a creature of local law, appointed by the governor and whose duties and responsibilities were subject to definition by the Legislature of Guam, or whether the Office of Attorney General should have "constitutional" status within the Organic Act itself.

A review of the Congressional history of the 1998 Amendments to the Organic Act, 48 U.S.C. § 1421g(d)(1), reveals that, contrary to the Guam Supreme Court's opinion, the Organic Act was not amended simply to authorize the Legislature to create an elected Office of Attorney General. The Guam Legislature's first suggestion was Bill Number 571. This bill would have transferred the supervision and control of the Attorney General from the Executive Branch to the Legislative Branch. Compiler of Laws Charles Troutman became involved in the debate surrounding the nature of the Office, and entered into a historic series of correspondence with Guam's delegate to Congress, Robert Underwood. Mr. Troutman responded to Bill Number 571 with a letter to Delegate Underwood, explaining that simply switching the possible influence over the Office from the executive to the legislative hardly met the objective of making the Office independent: "[T]he position, if you mention it at all, must be created by the Organic Act, not just

permitted." Letter from Charles H. Troutman to Congressman Underwood of April 1, 1997. Pet. App. C-3. Mr. Troutman wrote Delegate Underwood again on July 16, 1997, noting, "[I]f there is to be any substantive meaning to your amendment, the Attorney General needs to have some basic constitutional powers that are not subject to the Legislature's total will." Pet. App. D-1.[6]

On September 2, 1997 Compiler Troutman reiterated that the Attorney General as Chief Legal Officer must retain general supervisory control over the legal affairs of the Government of Guam in another letter to Delegate Underwood:

> I don't particularly care if the Prosecution Division is separated from the Attorney General, but only if there is enough control remaining in the Attorney General that he/she retains general supervision over the legal affairs of the Government of Guam. Most, if not all state attorneys general retain the power to file appeals [or] decline them, and to take over prosecutions in cases of conflicts of interests or other good reasons. . . .
>
> Concerning your Bill, I would hope that you can amend it to provide that the Attorney General, no matter how s/he is selected, has the "constitutional" duty of being the Chief Legal Officer of the

---

[6] Gifted with prescience, Mr. Troutman also wrote, "I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having many and diverse legal 'empires' within the Government of Guam. This is the same idea expressed in the 1970 Illinois Constitution." Pet. App. D-2. That there may be separate counsel authorized by the Guam Legislature for autonomous agencies has never been an issue. The issue is who would be authorized under Guam's Organic Act to keep a "check on having many and diverse legal 'empires' within the Government of Guam."

> Government of Guam and has some "constitutional" tenure of office.

Pet. App. E-2.

On October 10, 1997, the 24th Legislature of Guam adopted Guam Resolution Number 186, which proposed to Congress that the Office of Attorney General should be organically created, but that its powers and duties were to be defined by the local Legislature. Resolution 186 suggested the following amendment to the language of H.R. 2370:

> The Attorney General shall be the Chief Legal Officer of the Government of Guam, *shall be vested with common law powers and such additional powers and duties as may be prescribed under the laws of Guam*, not inconsistent with this chapter. The Attorney General shall prosecute all criminal violations of Guam law, provide legal advice to the government, and represent the government in all civil cases in which the Government of Guam may be interested . . . .

Guam Resolution No. 186 (emphasis added).

If Congress had intended the Legislature of Guam to have the authority to establish an elected Office of Attorney General, subject to definition by the local Legislature, that would have been an easy task. Unlike the Organic Act provisions pertaining to the Office of Attorney General, the Organic Act elsewhere expressly authorizes the local Legislature to prescribe the powers and duties of other elected "constitutional" officers such as Lieutenant Governor, Public Prosecutor and Public Auditor. *See, e.g.*, 48 U.S.C. § 1422 ("The Lieutenant Governor shall have such executive powers and perform such duties *as may be*

assigned to him by the Governor or prescribed by this chapter *or under the laws of Guam.*") (emphasis added); 48 U.S.C. § 1421g(c) ("The Government of Guam *may by law establish* an Office of Public Prosecutor and an Office of Public Auditor.") (emphasis added).[7]

Congress has, in various ways and over time, authorized the Legislature of Guam to create specific offices and officers, and to define their powers and duties. In each of these cases, Congress' intent has been quite explicit. With respect to public health, the Organic Act provides: "*Subject to the laws of Guam*, the Governor shall establish, maintain, and operate public health services in Guam, including hospitals, dispensaries, and quarantine stations, at such places in Guam as may be necessary...." 48 U.S.C. § 1421g(a) (emphasis added). With respect to public education, Congress amended the paragraph (b) of § 1421g

---

[7] The Offices of Public Prosecutor and Public Auditor differ from the Office of Lieutenant Governor and Office of Attorney General because the Organic Act does not itself create the Office of Public Auditor or Public Prosecutor, but merely authorizes the Legislature to do so. The same is true of Guam's Civil Service Commission. "The Government of Guam *may by law establish* a Civil Service Commission to administer the merit system." 48 U.S.C. § 1422c(a) (emphasis added). But Congress made no such provision for the local Legislature with respect to the Office of Attorney General. If the Legislature were to decide not to create the Office of Public Prosecutor, Public Auditor, or a Civil Service Commission (as it has to-date in the case of the Public Prosecutor), it could do so. Furthermore, if an office may be created by the local Legislature, then it may in turn be abolished by the local Legislature. Not so with the Office of Attorney General, as it is the Congress, not the local Legislature, which has established the Office and defined its powers. And yet, the practical effect of the Guam Supreme Court's opinion authorizes the Legislature of Guam to strip away all core powers and duties of the Office of Attorney General to the point that it may become a mere a shell, a "constitutional" Office in name only. The logical consequence of the decision is that the local Legislature could abolish the Office altogether.

to provide: "The Government of Guam shall provide an adequate public educational system of Guam, and to that end shall establish, maintain, and operate public schools *according to the laws of Guam*." 48 U.S.C. § 1421g(b) (emphasis added). Previously, the Governor had sole responsibility under the Organic Act to establish the public education system on Guam. It is not insignificant that paragraphs (a) through (c) of 48 U.S.C. § 1421g provide separately for the establishment *by law* for public health, public education, public auditor and public prosecutor, but that ¶ (d) is deafeningly silent with respect to the Legislature's authority to provide *by law* for the Office of Attorney General.

The amendments to the Organic Act proposed by the local Legislature, if enacted, would easily have ended this case before it even began. Guam Resolution 186, rejected by Congress, is the very result obtained by the respondent in the court below. Taken together with the fact that everywhere else in the Organic Act Congress explicitly authorized the local Legislature to prescribe the powers and duties of an office, the intentional failure to adopt proffered language authorizing the local Legislature to prescribe the powers and duties of the Office of Attorney General manifests a Congressional intent that the local Legislature was not to have such authority. [8]

---

[8] *Cf. Nelson v. Ada*, 878 F.2d 277, 281 (9th Cir. 1989) ("Congress was presented with, and rejected, a provision drafted by the board of education which would have expressly required that the school board be elected."). *See Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291 (2000) (against a backdrop of a distinct regulatory scheme, rejection by Congress of proposals to grant FDA jurisdiction to regulate tobacco is probative of intent to deny jurisdiction); *accord Whitman v. American Trucking Ass'n.*, 531 U.S. 457, 121 S. Ct. 903 (2001).

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS EXPRESSED ESPECIAL CONCERN WHEN NON-ARTICLE III TERRITORIAL COURTS INTERPRET FEDERAL LAW WITHOUT REVIEW BY ARTICLE III COURTS

Historically, this Court has expressed particularized concern when presented with the possibility that decisions of territorial courts that turn on questions of federal law may have no chance of being reviewed by an Article III court. In *Territory of Guam v. Olsen*, 431 U.S. 195, 97 S. Ct. 1774 (1977), this Court interpreted an amendment to the Organic Act of Guam which provided that the District Court of Guam "shall have such appellate jurisdiction as the [Guam] Legislature may determine." The question was whether, in authorizing the local Legislature to determine cases over which the federal District Court may have appellate jurisdiction from local courts, Congress had conferred upon the Guam Legislature the authority and discretion to *divest* the District Court of appellate jurisdiction in federal question cases as well.[9] This Court held that in the absence of clear Congressional intent to authorize the Legislature of Guam to divest the District Court of appellate jurisdiction in cases turning upon questions of federal law, it was without authority to do so:

> First, we should be reluctant without a clear signal from Congress to conclude that it intended to

---

[9] The District Court of Guam is an Article IV court, not an Article III court. *See Nguyen v. United States*, 539 U.S. 69, 72 n. 3, 123 S. Ct. 2130, 2133 n. 3 (2003); *Chase Manhattan (National Association) v. South Acres Development Co.*, 434 U.S. 236, 236-37, n.1, 98 S. Ct. 544, 545 n.1 (1978) (per curiam); *Olsen*, 431 U.S. at 196 n.1, 97 S. Ct. 1776 n.1.

> allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law. Important federal issues can be presented in cases which do not fall within the District Court's federal-question jurisdiction, because they do not "arise under" federal law, but instead fall within the exclusive jurisdiction vested in the Superior and Supreme Courts by the Reorganization Act.

Olsen, 431 U.S. at 201, 97 S. Ct. at 1778-79.[10]

Now that Congress has amended the Organic Act to remove all supervision of the local courts from the Ninth Circuit Court of Appeals, this case presents the very real possibility, as arose in *Olsen*, that cases first decided by the local courts of Guam that "arise under" federal law may entirely escape review by any Article III court.

This dispute was originally brought by the Attorney General of Guam, Douglas B. Moylan, in the District Court of Guam seeking a declaratory judgment action interpreting the Organic Act of Guam. Four days later, the respondent in federal court brought this action in the Superior Court of Guam. The District Court dismissed the first action on the basis of *Younger* and *Burford* abstention. While the dismissal of that case has been appealed to the Ninth Circuit, the case at bar proceeded to trial and judgment in the Superior Court

---

[10] By comparison, on the merits of the question presented here, absent express authority, the fact that Congress authorized the Legislature of Guam to determine the manner in which the Attorney General of Guam shall be selected, i.e., appointed or elected, and removed, does not necessarily imply a grant of Congressional authority to the local Legislature to determine the nature and function of the Office of Attorney General itself.

and was affirmed on appeal by the Supreme Court of Guam. Thus, the Airport Authority won the proverbial race to the courthouse.[11]

The District Court's decision to abdicate the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S. Ct. 1236, 1246 (1976), and to abstain pending local court review of the identical federal question presented has now worked the very same result expressly disapproved by this Court in *Olsen*, namely that an Article III court would be precluded from deciding questions arising under federal law, in particular, the Organic Act of Guam. If this Court does not grant the petition for writ of certiorari, the probability that no Article III court will have the opportunity to resolve this critical question of federal law will become a *fait accompli*, and a local territorial court will become the final arbiter of Congressional intent.

[11] The Airport Authority's race to and through the local courts is thus a double victory Congress could not have intended: First, the Guam Supreme Court committed demonstrable error in its analysis of Congressional intent; and second, in the event this Court does not grant the petition for review by certiorari, the Airport Authority will have succeeded in precluding appellate review by an Article III court of the federal question presented.

II. THE SUPREME COURT OF GUAM HAS DEVIATED FROM THIS COURT'S PRECEDENTS IN SIMILAR CASES CONSTRUING THE ORGANIC ACT OF GUAM

Since the creation of civil government for the Territory of Guam by Congress in 1950,[12] this Court has had three occasions to interpret the Organic Act of Guam. Each case makes clear that, absent a clear signal from Congress, and absent explicit evidence of Congressional intent, the local Legislature is not permitted to define the parameters of an Office established in Guam's Organic Act.

In *Territory of Guam v. Olsen*, 431 U.S. 195, 97 S. Ct. 1774 (1977), this Court stated that it was "reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, or decisions of territorial courts in cases that may turn on questions of federal law," 431 U.S. at 201, 97 S. Ct. at 1778, merely because Congress authorized the local Legislature to determine what cases may be appealed from the local courts to the District Court. Stated differently, this Court declined to conclude, without a clear signal from Congress, that a grant of authority to the local Legislature authorizing it to determine what appellate jurisdiction the District Court may have with respect to cases filed in the local courts carried with it the concomitant authority to divest that court of appellate jurisdiction it otherwise possessed. Similarly here, the grant of authority to the local Legislature to ascertain the manner of selection and removal of the Attorney General

---

[12] For brief histories of the evolution of Guam's civil government, see *Ngiraingas v. Sanchez*, 495 U.S. 182, 186, 110 S. Ct. 1737, 1740 (1990); and *In re: Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam*, 2004 Guam 10, ¶¶ 19-32, 2004 WL 1293239 (Guam 2004).

does not carry with it the concomitant authority to define the powers and duties of the Office itself.

In *Chase Manhattan Bank (National Association) v. South Acres Development Co.*, 434 U.S. 236, 98 S. Ct. 544 (1978) (per curiam), this Court declined to infer that Congress' grant of federal question jurisdiction to the District Court of Guam, an Article IV court, also implied a grant of diversity jurisdiction: "Because Congress has neither explicitly nor implicitly granted diversity jurisdiction to the District Court of Guam, we reverse." *Id.* at 236, 98 S. Ct. at 545. Similarly here, because Congress neither explicitly nor implicitly authorized the Guam Legislature to alter, abridge, restrict or modify the powers of the Attorney General, as it has done so clearly with respect to other Organic Act officers, the decision of the Supreme Court of Guam is due to be reviewed by this Court. Construing what inferences may be drawn from Congressional silence, this Court in *Chase Manhattan Bank* construed that silence against a broad grant of jurisdiction which might otherwise have been easily and explicitly conferred. "Conspicuously absent in this provision [granting federal question jurisdiction] is any mention of diversity jurisdiction." *Id.* at 237, 98 S. Ct. at 545. In this case, conspicuously absent is any mention of the local Legislature's authority to alter, abridge, restrict or modify the common law powers of the Attorney General's Office. In direct contravention of this Court's teaching in *Chase Manhattan Bank*, the Guam Supreme Court nonetheless found the Legislature of Guam had authority that Congress neither explicitly nor impliedly had conferred.

Finally, in *Gutierrez v. Ada*, 528 U.S. 250, 120 S. Ct. 740 (2000), a unanimous court held, per Justice Souter, that "where a word is capable of many meanings" courts should not impute "'unintended breadth to the Acts of Congress.'" 528 U.S. at 255, 120 S. Ct. at 744 (quoting *Jarecki v. G.D.*

Searle & Co., 367 U.S. 303, 307, 81 S. Ct. 1579 (1961)). In *Gutierrez*, this Court declined to impute more to Congressional intent than was explicit in the Act under consideration, particularly if it were to lead to an odd or irrational result. But that is precisely what occurred in the court below. For, the power to alter, abridge, restrict or modify is the power to abolish and destroy. Absent explicit authority conferred by Congress, the local Legislature is not authorized to destroy an Office created by Congress itself.

III. THE SUPREME COURT OF GUAM'S OPINION DIRECTLY CONFLICTS WITH NINTH CIRCUIT U.S. COURT OF APPEALS DECISIONS INTERPRETING THE ORGANIC ACT OF GUAM

The Guam Supreme Court's decision is also in conflict with two critical cases from the Ninth Circuit Court of Appeals construing the Guam Legislature's authority under the Organic Act. *See Bordallo v. Baldwin,* 624 F.2d 932 (9th Cir. 1980), and *Nelson v. Ada,* 878 F.2d 277 (9th Cir. 1989). The question presented in the first case was whether the Governor's Organic Act powers could be reduced by the local Legislature. The Ninth Circuit Court of Appeals held that the Organic Act did not authorize the Legislature to reduce the Governor's authority to a mere ministerial function, stating:

> The question presented to us then is whether, when the Governor is specifically charged by Section 1421g(a) of the Organic Act with the responsibility for establishing, maintaining, and operating hospitals, the Legislature may, within the terms of that act, reduce his function with respect to the governance of the Hospital to the mere ministerial function of

> validating the appointments made by others to the Hospital's governing body. We think it cannot.

Bordallo v. Baldwin, 624 F.2d at 934. Congress "specifically charged [the Governor] . . . with the responsibility for establishing, maintaining, and operating hospitals." Congress specifically charged the Attorney General with the responsibility to be the "Chief Legal Officer for the Government of Guam." The Organic Act is totally devoid of any authority from Congress to the local Legislature to alter, abridge, restrict or modify the parameters of the Office of Attorney General. Nonetheless, the Guam Supreme Court affirmed the Superior Court's Decision and Order directing the Attorney General to perform a ministerial act and sign a contract for legal services between an instrumentality of the Government of Guam and a private law firm not subject to the Congressionally mandated supervision, direction and control of the Chief Legal Officer for the Government of Guam.

In *Nelson v. Ada*, citing *Bordallo v. Baldwin* with approval, the Ninth Circuit declined, in the absence of any evidence of Congressional intent, to apply amendments to Guam's Organic Act retroactively in order to validate inconsistent local laws that would have stripped the Governor of appointment authority to local school boards:

> The language of the amendment to the Guam Organic Act itself says little about Congress' intent to ratify any preexisting scheme of selection of school board members under local law. The evidence of legislative intent in the legislative history of the amendment is sparse and equivocal.

Nelson, 878 F.2d at 280. Thus, according to Ninth Circuit precedent, when Congress is silent, or the evidence is "sparse

and equivocal," local laws in conflict with the distribution of powers of "constitutional" officers under the Organic Act are not to be retrospectively validated, as though Congress would impliedly approve. Again, if Congress had intended to ratify preexisting local laws, defining the powers and duties, and limitations, on the Office of Attorney General, all it had to do was add the phrase "and shall have such powers and duties as may be prescribed under the laws of Guam."

The Guam Supreme Court's opinion directly conflicts with precedent from the Ninth Circuit Court of Appeals in holding that not only could the Legislature reduce the Congressionally conferred Organic Act authority of the Office of Attorney General, but that prior inconsistent local laws in conflict with the Organic Act could be validated retrospectively and given Organic Act imprimatur not otherwise expressly authorized by Congress.

IV. THE SUPREME COURT OF GUAM ERRED IN FINDING AN IMPLIED GRANT OF AUTHORITY TO THE LOCAL LEGISLATURE OF THE TERRITORY OF GUAM THAT CONGRESS HAD ELSEWHERE, AND SO OFTEN, GRANTED ONLY EXPRESSLY

Unlike separate provisions of the Organic Act which expressly authorize the Guam Legislature to prescribe the powers and duties of other offices, the Organic Act is silent with respect to its authority to prescribe the powers and duties of the Office of Attorney General. The Guam Supreme Court could only speculate, from silence, that Congress intended to maintain the status quo with respect to the Guam Legislature's previous authority to modify the powers and duties of the Attorney General, and that all it really intended to do was provide for a manner of selection of the Attorney General other than by gubernatorial appointment. *GIAA*, ¶ 31. Pet. App. A-16. ("Thus, it *appears*

that the provisions with respect to the Attorney General were in direct response to controversies resulting from the 'appointment nature' of the Attorney General.") (emphasis added).

If anything, according to this Court's precedent and precedent from the Ninth Circuit, speculation favors the opposite conclusion. The heart of the Guam Supreme Court's error is found at ¶¶ 41 and 42 of its opinion wherein it acknowledge the significance of Resolution 186 from the local Legislature that proposed to Congress that it would retain the authority to define the parameters of the Office of Attorney General:

> Even more important is that Congress *did not adopt such language*.
>
> Accordingly, contrary to the Attorney General's assertion that Congress clearly intended that his office be immune from all local control, the legislative and other history reflects [sic] that Congress in fact did not incorporate proposed amendments which would have clearly delineated the Attorney General's powers in relation to the Governor and the Legislature. For this reason, we find that the legislative and other history of section 1421g provide no guidance in our determination of whether the Attorney General, as Chief Legal Officer of the Government of Guam, is vested with all powers at common law, and if so, whether such powers may be altered by the Legislature.

GIAA, ¶¶ 41-42, Pet. App. A-22, A-23 (emphasis in original).

The Attorney General could not agree more that it is important that Congress *declined* to adopt the language tendered by the 24th Guam Legislature in Resolution 186. But, it appears that at this point the Guam Supreme Court simply threw up its hands and disregarded the Congressional history and context of the Act altogether. The fact that Congress rejected the Guam Legislature's proposal is important: When presented with the opportunity to authorize the Guam Legislature to vest the Attorney General with such powers and duties "as may be prescribed under the laws of Guam," Congress declined the invitation.

Should this Court grant review, the underlying question will be what Congress intended by the term "Chief Legal Officer of the Government of Guam." It is not expressly defined in the Organic Act, nor is the local Legislature expressly authorized to define it. In *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 121 S. Ct. 903 (2001), this Court considered whether ambiguities in the Clean Air Act ("CAA") authorized the Environmental Protection Agency to consider implementation costs in revising national ambient air quality standards. This Court first noted, "Words that can have more than one meaning are given context, however, by their surroundings." *Id.* 531 U.S. at 466, 121 S. Ct. at 909. This Court then held that a statutory "textual commitment of authority," *id.*, 531 U.S. at 468, 121 S. Ct. at 909, is required, and "therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id*, 531 U.S. at 467, 121 S. Ct. at 908. In the case at bar, the Guam Supreme Court failed to examine Congressional intent in the context of the Organic Act as a whole, "that has elsewhere, and so often," expressly granted the local Legislature authority to prescribe powers and duties of other Organic Act officers, yet is so

silent with respect to the Legislature's authority to define the Office of Attorney General.

In *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291 (2000), this Court held that the Food and Drug Administration ("FDA") did not have the statutory authorization to regulate tobacco products. This Court found it probative that Congress had been presented and rejected numerous proposals to give the FDA jurisdiction. "Congress considered and rejected several proposals to give the FDA the authority to regulate tobacco." *Id.* 529 U.S. at 147, 120 S. Ct. at 1308.

> Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, *squarely rejected proposals to give the FDA jurisdiction over tobacco*, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Id., 529 U.S. at 159-60, 120 S. Ct. at 1315 (emphasis added). Similarly here, against a backdrop of specific Congressional enactments explicitly authorizing the Legislature of Guam to prescribe powers and duties of other "constitutional" officers established in the Organic Act, rejection by Congress of a proposed amendment that would confer similar authority with respect to defining the parameters of the Office of Attorney General is probative of Congressional intent to deny the local Legislature that authority. Nonetheless, the Guam Supreme Court *implied* a broad grant of authority to

the local Legislature that Congress *explicitly* conferred with respect to every other office established in the Organic Act.

Unlike other "constitutional" officers established by Congress for the Territory of Guam, the Organic Act is silent as to the local Legislature's authority to prescribe the powers and duties of the Office of Attorney General. Congress knew full well how to authorize the local Legislature to prescribe the powers and duties of the Office of Attorney General, for it had done so numerous times with respect to other Territorial offices since 1950. Moreover, when presented with a proposed amendment from the local Legislature to expressly authorize the local Legislature to prescribe the powers and duties and define the parameters of the Office of Attorney General, Congress declined. The Supreme Court of Guam erred in its holding that the local Legislature has implied authority delegated from Congress that it only has explicitly with respect to every other officer established by Congress for the Government of Guam.

CONCLUSION

The Guam Supreme Court's decision "ignores the horse while concentrating on minute details of the cart's design." *Olsen*, 431 U.S. at 205, 97 S. Ct. at 1781 (Marshall, J., dissenting). Rather than ascertain what Congress intended by the term "Chief Legal Officer," and what role, if any, was left for the Legislature of Guam to define the powers and duties of the Attorney General, the Guam Supreme Court disregarded the legislative history of the amendments and the context of the Organic Act altogether, in an effort to superimpose Organic Act imprimatur on local Legislative acts in conflict with the text of Organic Act itself.

The Attorney General of Guam respectfully submits that the holding of the Supreme Court of Guam is incompatible with Congressional intent, and in conflict with controlling precedent from this Court and the Ninth Circuit Court of Appeals. Because this is a significant federal question of Congressional intent, that may never be reviewed by an Article III court, and because the decision of the Court below is in direct conflict with binding precedent from this Court and from the Ninth Circuit Court of Appeals, the Attorney General respectfully submits that the petition for certiorari is due to be granted.

Respectfully submitted,

ROBERT M. WEINBERG
Assistant Attorney General
Counsel of Record
Guam Attorney General's Office
287 West O'Brien Drive
Hagåtña, Guam 96910 USA
Telephone: (671) 475-3324
Telecopy: (671) 472-2493
Attorney for Petitioner

APPENDIX

IN THE SUPREME COURT OF GUAM

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY,
by and through its Board of Directors,
Petitioner-Appellee,
vs.
DOUGLAS B. MOYLAN,
Attorney General of Guam
Respondent-Appellant,

Supreme Court Case No.: CVA04-008
Superior Court Case No.: SP0055-03
OPINION
Filed: February 8, 2005
Cite as: 2005 Guam 5
Appeal from the Superior Court of Guam
Argued and submitted on October 28, 2004
Hagåtña, Guam

Attorney for Respondent-Appellant:	Attorney for Petitioner-Appellee:
Robert M. Weinberg, Esq. Assistant Attorney General Office of the Attorney General Civil Division Guam Judicial Center, Suite 2-200E 120 West O'Brien Drive Hagåtña, Guam 96910	David A. Mair, Esq. Mair, Mair, Spade & Thompson A Professional Corporation Attorneys at Law 238 A.F.C. Flores Street Suite 801, Pacific News Building Hagåtña, Guam 96910

BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Chief Justice (Acting)[1]; JOHN A. MANGLONA and ALEXANDRO C. CASTRO, *Justices Pro Tempore*.

---

[1] Chief Justice F. Philip Carbullido recused himself from deciding this matter. Associate Justice Tydingco-Gatewood, as the senior member of the panel, was designated as the Acting Chief Justice.

PER CURIAM:

[1] *This is an appeal from the* trial court's final judgment granting mandamus relief to the Guam International Airport Authority (GIAA), directing the Attorney General of Guam, Douglas B. Moylan, to approve as to form and legality a legal services contract between GIAA and a private law firm. The Attorney General asserts that when the United States Congress designated his office as the "Chief Legal Officer" of the Government of Guam through the 1998 Amendments to the Organic Act of Guam ("1998 Amendments"), common law powers attached to his office which cannot be modified, restricted, or removed by local legislation. As such, the Attorney General contends that Title 12 GCA §1108, which authorizes GIAA to retain outside counsel, and Title 5 GCA §30109, which authorizes GIAA to use its own legal counsel instead of the Attorney General to conduct civil actions in which it is an interested party, are unconstitutional.

[2] We hold that the 1998 Amendments bestowed common law powers and duties upon the Attorney General of Guam. We further hold that those common law powers and duties may be subject to increase, alteration or abridgement by the Guam Legislature. Because we hold that Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109 are valid exercises of the Guam Legislature's constitutional powers granted by the Organic Act, the trial court judgment is **AFFIRMED**.

I.

[3] In 1998, Congress amended the Organic Act to provide, among other things, that "[t]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." 48 U.S.C. §1421g(d)(1) (West, WESTLAW through Dec. 23, 2004). Prior to the 1998 Amendments, the

Guam Legislature enacted legislation which authorized GIAA to retain private counsel. Title 12 GCA §1108(a) and (c) (2002). Also, prior to the 1998 Amendments, the Guam Legislature had enacted legislation prohibiting the execution of contracts for the services of legal counsel in the executive branch without the approval of the Attorney General as to form and legality. Title 5 GCA §§5121 and 5150 (2004).

[4] In a letter dated January 28, 2003, the Attorney General advised GIAA's Executive Manager that he had been informed of efforts to retain private counsel by government agencies such as GIAA. Appellant's Excerpts of Record ("ER"), pp. 68-70 (Letter from Moylan to Thompson of 1/28/03). The Attorney General noted that his approval was required "prior to any private attorney being retained to represent the government of Guam." *Id.* (alteration in original). The Attorney General further requested that GIAA execute a memorandum of understanding ("MOU") to begin our relationship." *Id.*

[5] On February 11, 2003, the MOU was sent by the Attorney General to GIAA, the thrust of which required that the Attorney General would hire the attorney to work for GIAA at GIAA's expense, and further, that GIAA would provide such attorney with supplies and equipment and one staff person at its expense. Appellee's Supplemental Excerpts of Record ("SER"). Tab 3 (Memorandum from Guthrie to Thompson of 2/11/03).

[6] A few days after completing the procurement process, on March 3, 2003, GIAA sent the executed legal services contract with the private law firm of Mair Mair Spade & Thompson to the Attorney General for his approval. Appellee's SER, Tab 6, Ex. 4 (Mair Decl.). That same day, the Attorney General filed suit in the District Court of Guam against the Executive Manager of GIAA. Appellee's SER,

Tab 6, Ex. 5 (Mair Decl., ¶8). The federal action was dismissed on April 1, 2003. Appellee's SER, Tab 11 (Order).

[7] GIAA filed a Petition for Writ of Mandamus against the Attorney General in the Superior Court of Guam on March 7, 2003. Appellant's ER, p. 1 (Petition for Writ of Mandamus). The Petition was granted by the trial court on May 12, 2003, Appellant's ER, p. 120 (Decision and Order on Writ of Mandate), and final judgment granting mandamus relief was filed on January 30, 2004. Appellant's ER, pp. 138-39 (Final Judgment Granting Peremptory Writ of Mandamus). This appeal followed.

II.

[8] This court has jurisdiction to "hear appeals over any cause in Guam decided by the Superior Court of Guam . . ." 48 U.S.C. 1424-1(a)(2) (West, WESTLAW through Dec. 23, 2004).[2]

[9] An appeal from trial court judgment granting mandamus relief, where there are no issues of fact in dispute, is reviewed *de novo.* *Holmes v. Territorial Land Use Comm'n,* 1998 Guam 8, ¶6.

[10] "Mandamus relief is an extraordinary remedy employed in extreme situations." *Guam Publ'ns, Inc. v. Superior Court,* 1996 Guam 6, ¶10. A writ of mandate may be used to compel the performance of a legal duty. Title 7 GCA §31202 (1994); *People v. Superior Court of Guam (Laxamana),* 2001 Guam 26, ¶12; *see also Envtl. Prot. Info. Ctr., Inc. v. Maxxam Corp.*, 6 Cal. Rptr. 2d 665, 670 (Dist.

---

[2] At the time of the filing of this appeal from a judgment granting mandamus relief, this court's jurisdiction was based on Title 7 GCA §3107 (2004).

Ct. App. 1992) ("The [writ of mandate] lies to compel the performance of a legal duty imposed on a government official."). A writ may be issued where a beneficially interested party establishes that he has no plain, speedy and adequate remedy available at law. Title 7 GCA §31203 (1994); *Laxamana*, 2001 Guam 26 at ¶12.

III.

[11] In this case, a writ of mandate was issued to compel the Attorney General to approve as to form and legality the legal services contract between GIAA and the Mair law firm. The issue of whether the Attorney General has a legal duty to act and GIAA has a clear, present and beneficial right to performance of that duty, turns on a resolution of the constitutionality of Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109. In other words, we must first address whether Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109 are in conflict with the Attorney General's role as Chief Legal Officer. The answer to such inquiry requires this court to determine the broader issue of whether the Attorney General, as Chief Legal Officer of the Government of Guam, is vested with common law powers, and if so, the scope of such powers.

[12] The Attorney General argues that the Guam Legislature is without authority to diminish the powers and duties of the Attorney General, who, by virtue of the express language found in the Organic Act, is the Chief Legal Officer of the Government of Guam. In particular, the Attorney General argues that: (1) congressional history reflects that the legislative intent behind the 1998 Amendments was not merely to change the method of selecting the Attorney General, rather, the legislative intent was to incorporate the common law powers of the Attorney General, which would not be subject to prescription by the

Guam Legislature; (2) as Chief Legal Officer, the Attorney General is endowed with inherent common law powers, which include ensuring that a unified and consistent legal policy of the government of Guam is set, and being accountable for the conduct of all suits and other judicial proceedings involving the government of Guam; (3) because the Attorney General is the Chief Legal Officer of the Government of Guam, and because GIAA is an instrumentality of the government of Guam, it logically follows that, under the plain meaning rule, the Attorney General is the attorney for GIAA and (4) the approval of private counsel for GIAA involves a discretionary act, and therefore, mandamus will not lie to dictate the exercise of a such discretionary act in a particular manner. In support of his arguments, the Attorney General relies on case law from Illinois, Mississippi, Alabama, Washington, Indiana, Florida and California.

[13] GIAA opposes each of the Attorney General's contentions, and asserts that: (1) congressional history does not support the Attorney General's arguments, but rather, the legislative history is void of any indication that Congress intended to preempt, or restrict, the Legislature's powers to allow government agencies such as GIAA to retain independent counsel; (2) the Organic Act does not prohibit the Guam Legislature from limiting the powers of the Attorney General, and further, may permit government of Guam agencies to retain independent counsel; (3) local law has not been preempted by federal law; (4) mandamus relief is appropriate because the approval of contracts is purely a ministerial act; (5) the Attorney General is statutorily required to represent line agencies; and (6) the Guam Legislature, and not the Attorney General, is responsible for determining public policy. GIAA distinguishes the cases cited by the Attorney General and maintains that they are inapplicable to the facts before us, and therefore urges this

court to follow case law from the jurisdictions of Arizona, Kentucky, Missouri, North Dakota, Oklahoma and Utah.

[14] We begin our analysis with a discussion of the relevant statutory provisions.

A. Relevant Statutory Provisions

[15] The Attorney General contends that the local statutes which authorize the GIAA to retain outside counsel are inconsistent with the Attorney General provision found in section 1421g(d)(1) of the Organic Act, which provides that "[t]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." 48 U.S.C. §1421g(d)(1).

[16] Specifically, Title 12 GCA §1108 authorizes GIAA to appoint an attorney, and further defines the attorney's role as counsel to GIAA. It provides in part:

> (a) The [GIAA] Board may also appoint . . . an attorney, all of whom shall serve at the pleasure of the Board. . . . (c) The Attorney, who must have been admitted to the practice of law in Guam, shall advise the Board and the Executive Director on all legal matters to which the Authority is a party or in which the Authority is legally interested, and may represent the Authority in connection with legal matters before the Legislature, boards and other agencies of the Territory or of the United States. The Attorney for the Authority shall represent the Authority in litigation concerning the affairs of the Authority.

Title 12 GCA §1108 (2002).

[17] Guam's procurement laws requires that all legal services contracts for the executive branch be approved by the Attorney General. Specifically, Title 5 GCA §5121(b) states:

> No contract for the services of legal counsel in the Executive Branch shall be executed without the approval of the Attorney General. Nothing in this Section or Chapter shall preclude the Attorney General or his designee from participating in negotiations for any contract upon the request of the government officer or agency primarily responsible for such negotiations.

Title 5 GCA §5121(b) (2004).

[18] However, Title 5 GCA §5150 states that the Attorney General's role with respect to the approval of procurement contracts is to determine correctness as to form and legality. Section 5150 states:

> The Attorney General, the Deputy Attorney General or such Assistant Attorneys General as the Attorney General may designate, shall serve as legal counsel and provide necessary legal services to the Policy Officer and the General Services Agency. *The Attorney General shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality.* In making such a determination of legality, he may require any or all agencies involved in the contract to supply him with evidence that the

> required procedures precedent to executing the contract were carried out. He may prescribe the forms and format required to be followed by the agencies in aiding him in his determination of legality.

Title 5 GCA §5150 (2004) (emphasis added).

[19] Moreover, although the Attorney General is authorized to institute civil actions on behalf of the Government of Guam, an individual agency such as GIAA may instead utilize its outside counsel for such purposes. Specifically, Title 5 GCA §30109(c) states that the Attorney General may "[c]onduct on behalf of the government of Guam all civil actions in which the government is an interested party; provided that those branches, departments or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General." Title 5 GCA §30109(c) (2003).

[20] Accordingly, the issue for this court's determination is whether the above statutory provisions are in conflict with the Attorney General's role as Chief Legal Officer and thus unconstitutional. As previously stated, the answer to such issues requires this court to determine, in the first instance, whether the Attorney General, as Chief Legal Officer of the Government of Guam b virtue of the Organic Act, is vested with all powers at common law, and if so, whether such powers may be altered by the Legislature.

B. The Legislature's Organic Act Powers and Constitutional Challenges to Local Law

[21] "The Organic Act serves the function of a constitution for Guam." *Hauser v. Dep't of Law,* 97 F.3d 1152, 1156 (9th Cir. 1996); *see also* *People v. Perez,* 1999

Guam 2, ¶15 ("Until Guam creates its own Constitution, the Organic Act of Guam is the equivalent of Guam's Constitution."). Section 1423a of the Organic Act, as amended by Congress in 1998, states that "[t]he legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam." 48 U.S.C. §1423a (West, WESTLAW through Dec. 23, 2004). Congress' intent in amending section 1423a was to "clarify[y] the legislature's power[s] 'to provide Guam with a greater measure of self-government.'" *In re Request of Gov. Felix P. Camacho Relative to the Interpretation and Application of Section 6 and 9 or the Organic Act of Guam*, 2004 Guam 10, ¶33 (quoting H.R. Rep. No. 105-742 (1998), 1998 WL 658802 at *3). While we recognize the broad authority granted the Legislature in the Organic Act, we are equally cognizant of the "well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act." *In re Request of Gov. Felix P. Camacho Relative to the Interpretation and Application of Section 11 of the Organic Act of Guam*, 2003 Guam 16, ¶15 n.5; *see also Haeuser*, 97 F.3d at 1156 (observing that "Guam's self-government is constrained by the Organic Act, and [thus] the courts must invalidate Guam statutes in derogation of the Organic Act."). Whether a law or statute violates the Organic Act is a question of law. *See Perez*, 1999 Guam 2 at ¶6.

[22] In assessing whether a law enacted by the Guam Legislature comports with the Organic Act, we "must begin with the general rule that legislative enactments are presumed to be constitutional." *In re Request of Gov. Carl T.C. Gutierrez Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1, ¶41. Here, the Attorney General raises the issue of whether Title

12 GCA §1108(a) and (c), which authorize GIAA to retain private counsel to represent its interests in legal matters, is unconstitutional because it is in derogation of 1421g of the Organic Act, which creates the Office of the Attorney General, and designates such officer as the Chief Legal Officer of the Government of Guam. Accordingly, the Attorney General bears the burden of proving the unconstitutionality of Title 12 GCA sections 1108(a) and (c). *Id.* ("[H]e who alleges the unconstitutionality of an act bears the burden of proof . . . ."). [T]he validity of sections 1108(a) and (c) "is to be upheld if at all possible with all doubt resolved in favor of legality[,] and unconstitutionality will be decreed only when no other reasonable alternative presents itself." *Id.*

C. Chief Legal Officer of the Government of Guam

1. Legislative and Other History

[23] The Attorney General argues that the congressional record with respect to section 1421g(d) of the Organic reflects that the "Attorney General is endowed with an entirely different character because it was 'organically' created by Congress, not created or defined in local law. And until Congress says otherwise, the Office is immune from local control, be that executive or legislative interference or prescription." Appellant's Opening Brief, p. 15 (June 14, 2004).

[24] The strongest piece of legislative history in support of the Attorney General's interpretation of the 1998 Amendments is the testimony and correspondence of the former Compiler of Laws Charles Troutman, in response to the amendments proposed by former Congressman Robert Underwood, Guam's congressional delegate. More specifically, in a letter dated July 16, 1997 to Congressman

Underwood, the Compiler stated, *inter alia,* that "if there is any substantive meaning to your amendment, the Attorney General needs to have some basic constitutional powers that are not subject to the Legislature's total will." Appellant's ER, p. 37 (Letter from Compiler to Congressman Underwood of 7/17/97). Thus, the Compiler recommended the following language, which he claims "is the same idea as expressed in the 1970 Illinois Constitution:

> [The legislature shall] set forth the duties and compensation of the Attorney General, *who, in addition,* shall be the chief legal officer of the Government of Guam having cognizance over all legal matters in which the government is anywise interested.

Id. at p. 37. Explaining the above language, the Compiler further stated, "I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having many and diverse legal "empires" within the government of Guam." *Id.* at p. 37. It is important to note, however, that the bill apparently was not amended to reflect the Compiler's changes.

[25] Furthermore, in his testimony before the Committee on Resources, on October 29, 1997, the Compiler opined that "the present proposal is seriously deficient."[3] Appellant's ER, p. 42 (Acting Attorney General Charles H. Troutman, Witness Testimony before the Comm. on Resources (Oct.

[3] Note that the Compiler enumerated three reasons for the deficiency: first, he recommended repeal of the language regarding the public prosecutor, second, he recommended clarification of the duties of the Attorney General; third, he recommended strengthening the tenure of the office so that the Attorney General could only be removed for cause if appointed, and by recall, if elected. Only the issue regarding the duties of the position are relevant for our purposes and thus, it is not necessary to discuss the Compiler's other concerns.

29, 1997)). The Compiler expressed no preference for either an appointed or elected Attorney General, as long as the position was created in the Organic Act, and "the overall duties and functions [are] provided [for] in the Organic Act, much as is found in the Constitution of the State of Illinois." *Id.* The Compiler suggested the following language: "The Attorney General shall be the chief legal officer of the territory of Guam and shall have such other duties and such compensation as the Legislature may provide by law." *Id.* Significantly, Congress did not add the language suggested by the Compiler.

[26] While the Compiler clarified his stance on the constitutional role of the Attorney General, his proposed amendments were not wholly adopted by Congress. Thus, his comments are not relevant to the issue of whether the Legislature may authorize agencies to hire outside counsel. Rather, because Congress apparently decided not to insert *any* language regarding the Legislature's authority in relation to the powers and duties of the Attorney General, it appears that Congress preferred not to tie the hands of the Legislature in this regard.

[27] Based on our review of the legislative and other history surrounding section 1421g of the Organic Act, which we discuss in detail below, we reject the Attorney General's assertion that congress intended that his office be immune from all legislative control.

[28] The office of the Attorney General as it exists today was constitutionally created by virtue of the Guam Organic Act Amendments of 1998. H.R. 2370, 105th Cong. (1998). Codified at 48 U.S.C. §1421g, the provision relative to the Attorney General states in its entirety:

(d) Attorney General

(1) The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam. At such time as the Office of the Attorney General of Guam shall next become vacant, the Attorney General of Guam shall be appointed by the Governor of Guam with the advice and consent of the legislature, and shall serve at the pleasure of the Governor of Guam.

(2) Instead of an appointed Attorney General, the legislature may, by law, provide for the election of the Attorney General of Guam by the qualified voters of Guam in general elections after 1998 in which the Governor of Guam is elected. The term of an elected Attorney General shall be 4 years. The Attorney General may be removed by the people of Guam according to the procedures specified in section 1422d of this title or may be removed for cause in accordance with procedures established by the legislature in law. A vacancy in the office of an elected Attorney General shall be filled-

(A) by appointment by the Governor of Guam if such vacancy occurs less than 6 months before a general election for the Office of Attorney General of Guam; or

> (B) by a special election held no sooner than 3 months after such vacancy occurs and no later than 6 months before a general election for Attorney General of Guam, and by appointment by the Governor of Guam pending a special election under this subparagraph.

48 U.S.C. §1421g.

[29] "As reported from the Committee on Resources, the purpose of H.R. 2370 [was] to amend the Organic Act of Guam to clarify local executive and legislative provisions in such Act." H.R. Rep. No. 105-742, 105th Cong. (1998), available at 1998 WL 658802, at *2. It is worth noting that while H.R. 2370 amended the Organic Act to create the office of the Attorney General and give such office the title of Chief Legal Officer of the Government of Guam, it also expanded the local legislative power to include *"all rightful subjects of legislation* not inconsistent with [the Organic Act]," in order to achieve "a greater measure of self-government equal to that of the U.S. Virgin Islands." *Id.* at *3 (emphasis added).

[30] Specifically in relation to the Attorney General provisions in H.R. 2370, the House Report states, *in its entirety:*

> *Guam's Attorney General is currently appointed* by the Governor of Guam with the advice and consent of the Guam Legislature. The appointment of the Attorney General is to a four year term or until the end of the term of

> the appointing Governor, whichever is sooner. The Governor may remove the Attorney General for cause.
>
> *Controversies have arisen in the past because of the appointment nature of the position of Attorney General.* Public concerns revolve around political interference with investigations, inefficiency of case work and dismissal of the Attorney General without cause.
>
> In response to the growing number of complaints, a survey was conducted to determine an acceptable resolution. It was clear that respondents (69%) favored an elected position. The survey also asked whether the position should be mandated by Congress, or left to the Guam Legislature to create. A slight majority of citizens favored local legislation. An amendment to Guam's Organic Act is needed to allow for an elected Attorney General. *This legislation provides a mechanism for elected legislators to act on this issue.*

Id. at *2-3 (emphasis added).

[31] Thus, it appears that the provisions with respect to the Attorney General were in direct response to controversies resulting from the "appointment nature" of the Attorney General. The House Report also alludes to a survey conducted on Guam which sought feedback from residents as to whether they desired an elected Attorney General, and if so, whether Congress should mandate the elected office, or whether the creation of the elected office should be left to

local legislators. According to the survey, 69% of respondents desired an elected Attorney General. Of the 69% desiring an elected Attorney General, a slight majority wished to leave the creation of the elected office to the local legislature. It can be argued that H.R. 2370 was thus a direct response by Congress to the desires of the people of Guam as reflected by the survey results – through the 1998 Amendments, Congress authorized the Legislature, if it so desired, to change the appointed nature of the Attorney General to an elected one.

[32] Moreover, with respect to committee action, the House Report states that an amendment by way of a substitute bill was offered an adopted by the committee. This substitute bill H.R. 2370 thus focused on changes regarding the *elective* nature of the Attorney General, and quorum size and powers of the Legislature. Specifically, the House Report provides:

> On July 29, 1998, the Committee met to mark up H.R. 2370. An amendment in the nature of a substitute to focus the changes to the Organic Act of Guam to provisions about *the election* of the Attorney General of Guam, quorum size, and clarification of legislative powers was offered by Mr. Underwood and adopted by voice. The bill was then ordered favorably reported to the House of Representatives by voice vote.

Id. at *3-4 (emphasis added).

[33] Similarly, in a subsequent report of the legislative and oversight activities of the Committee on Resources during the 105th Congress, the committee reported that it "passed the 'Guam Organic Act Amendments' (H.R. 2370)

authorizing changes to the Federal law authorizing the government structure in Guam by allowing the people of Guam to determine if the Attorney General should be an elected office, adjust the size of the legislative quorum to a simple majority to correspond with the size of the legislature, and to clarify the authority of the legislature over local matters." *Id.* at *6.

[34] Upon review of the house reports, it is clear that Congress intended to respond to the controversies of the "appointment nature" of the Attorney General, and by virtue of the 1998 Amendments, "provide[d] a mechanism for elected legislators to act on this issue." H.R. Rep. No. 105-742, 1998 WL 658802 at *3. For this reason, the provisions of H.R. 2370 focused on "the election of the Attorney General of Guam." *Id.* Equally clear is that nothing in the House Report expresses or implies that Congress intended to grant all common law powers and duties to the Attorney General which could never be altered by the Legislature. In other words, the legislative history of section 1421g of the Organic Act provides no support for the Attorney General's assertion that Congress intended, by designating the Attorney General as the Chief Legal Officer, to prohibit the local legislature from altering powers that the office might otherwise possess at common law.

[35] Through testimony provided to the Subcommittee on Native American and Insular Affairs on July 24, 1996, Senator Barrett-Anderson discussed at length the importance of the creation of an *elected* Attorney General. *See* Cong. Testimony of Sen. Barrett-Anderson, July 24, 1996, 1996 WL 10830029. She stated, in relevant part:

> Why an elected Attorney General? Empowering the people of the Territory to elect their Attorney General is a statement of

> greater self-government on the part of the people of Guam. . . . Electing an Attorney General is not an unrealistic concept which seeks to create new legal theories of self-government . . . . Today 46 states elect their Attorney General under constitutional guidelines. . . . The people of Guam expect their Attorney General to protect their interest above all else. An appointed Attorney General, unfortunately, must respond to a great extent to the concerns of the Governor. The Attorney General of Guam has historically suffered from this dilemma. The people of Guam are frankly tired of the constant criticisms focused on the very position which the people demand the highest degree of legal integrity.

Id. Senator Barrett-Anderson's testimony focused solely on the *means* of selecting the Attorney General. She asserted that the people of Guam expect the Attorney General to protect their interest above all else, and for that reason, proposed that the only solution was to allow the citizens of Guam to elect the Attorney General. Moreover, focusing on the elective versus appointive nature of the Attorney General, Senator Barrett-Anderson also provided a prime, personal example of the conflict of interest that arises through the appointment nature of the Attorney General.[4]

---

[4] Senator Barrett-Anderson testified that during her term as Attorney General, she advised the Governor of the unconstitutionality of a local law. However, because she was appointed by and answerable to the Governor, she hesitated to file a suit to enjoin him from executing the law, and further, she could not represent his interests when the law was challenged on appeal.

[37] At the July 24, 1996 oversight hearing in which Senator Barrett-Anderson testified, Chairman Elton Gallegly of the Subcommittee on Native American and Insular Affairs similarly expressed that the purpose of the 1998 Amendments was to create an elected office of the Attorney General. *See* Statement of Chairman Gallegly, July 24, 1996, 1996 Wl 10830027 ("The Legislature of Guam . . . requests that the Congress give Guam the authority to determine the method of selecting their attorney general. No doubt there is a compelling reason the Legislature identified *the selection of the attorney general* as a matter warranting a change in current law.") (emphasis added). Likewise, in a statement provided at the oversight hearing, Allen P. Stayman, Director of the Office of Insular Affairs, stated:

> The Legislature of Guam . . . requests that the Organic Act of Guam be *amended to require election of the Attorney General* of Guam. At present, the Attorney General is appointed by and serves at the pleasure of the Governor of Guam. I believe that the *issue of appointment or election* of the Attorney General is a local self-government issue, which should be decided in Guam.

Statement of Director Stayman, July 24, 1996, 1996 WL 10830030 (emphasis added).

[38] Senator Barrett-Anderson again testified before the subcommittee on October 29, 1997. *See* Cong. Testimony of Sen. Elizabeth Barrett-Anderson, Oct. 29, 1997, 1997 WL 14153025. At this time, the senator was particularly concerned with the language of H.R. 2370, which did not firmly establish the Attorney General as a co-equal executive branch position which fell outside of the Governor's general supervision and control powers. *Id.* She also took issue with

the language of H.R. 2370 which granted the Legislature the power to decide whether to create an elected office. *Id.* Rather, she urged Congress to mandate, through the Organic Act, that the position be elected. *Id.* On behalf of the 24th Guam Legislature, she transmitted her testimony, along with the Legislature's Resolution No. 186, which delineated the proposed changes to the Organic Act as she described. Seemingly, her primary and arguably sole concern, again, was the interference by the Governor inherent in an appointed position and the continued interference should Congress decide not to expressly except the Attorney General from the Governor's general supervision and control powers.

[39] Senator Ben Pangelinan's testimony before the committee similarly focused on the importance of insulating the Attorney General from the control of the Governor, b mandating the election of the office of the Attorney General. *See* Cong. Testimony of Sen. Ben Pangelinan, Oct. 29, 1997, 1997 WL 16138742. Senator Pangelinan testified, in relevant part:

> I further wish to convey the unequivocal desire of the people of Guam to elect their Attorney General. This expression of their desire has been reiterated and embodied in the resolutions overwhelmingly passed by both the Twenty-Third and the Twenty-Fourth Guam Legislature. The direct solution b the will of the people of Guam of the Attorney General is right, just, and prudent for the people of Guam to have an independent Attorney General, unfettered by incessant political intervention from a single individual.

. . . .

> Thus I seek a clear language that grants the people of Guam the right to elect our attorney general, so that we will have removed another obstacle t our self-governance and once again reaffirm our high level of political maturity.

Id.

[40] From the testimonies of both senators, it appears that the intent of the 1998 Amendments was to create in the Organic Act the *elected* office of the Attorney General and insulate such officer from the control of the Governor, and no more. Significantly, any and all concern regarding "political interference" was in reference to the Governor, and not the Legislature through its power to enact laws which arguably affect the powers and duties of the Attorney General, such as authorizing the retention of private counsel by government agencies.

[41] It is important to note that although neither senator discussed the powers or duties of the Attorney General, Resolution 186, passed by the 24th Guam Legislature and submitted to Congress, suggested the following amendment to the language of H.R. 2370:

> The Attorney General shall be the chief legal officer of the government of Guam, shall be vested with common law powers and such additional powers and duties as may be prescribed under the laws of Guam, not inconsistent with this chapter. The Attorney General shall prosecute all criminal violations of Guam law, provide legal advice to the government, and represent the government in all civil cases in which the government of Guam may be interested. . . .

Res. 186, 24th Guam Leg. First Reg. Sess. (1997).[5] Even more important is that Congress *did not adopt such language*.

[42] Accordingly, contrary to the Attorney General's assertion that Congress clearly intended that his office be immune from all local control, the legislative and other history reflects that Congress in fact did not incorporate proposed amendments which would have clearly delineated the Attorney General's powers in relation to the Governor and the Legislature. For this reason, we find that the legislative and other history of section 1421g provide no guidance in our determination of whether the Attorney General, as Chief Legal Officer of the Government of Guam, is vested with all powers at common law, and if so, whether such powers may be altered by the Legislature.

2. Common Law Powers

a. Jurisdiction Relied upon by the Attorney General

---

[5] We note that the recital clauses do not discuss the powers or duties of the Attorney General. Rather, the recital clauses express the Legislature's desire to amend the proposed H.R. 2370 to create the elected office of the Attorney General and to insulate the officer from the general supervision of the Governor. Res. 186, 24th Guam Leg. First Reg. Sess. (1997). (stating the desire "to provide for an elected Attorney General of Guam, independent from the general supervision of the Governor ..."); *see* Cong. Testimony of Sen. Elizabeth Barrett-Anderson, Oct. 29, 1997, 1997 WL 14153025 ("The 24th Guam Legislature by Resolution #186 strongly advises that Congress enact an amendment that clearly, and unequivocally establishes the attorney general as a co-equal executive branch position."). Accordingly, the Legislature, through Resolution 186, included a proposed amendment to the Organic Act which would vest the executive power in "the Governor, the Lieutenant Governor, and the Attorney General."

[43] The Attorney General relies primarily on Illinois cases which hold that the Attorney General possesses all common law powers which cannot be regulated by the state legislature. The Illinois Supreme Court has observed: "[T]his court has consistently held, under both the 1870 and 1970 constitutions, that the Attorney General is the chief legal officer of the State; that is, he or she is 'the law officer of the people, as represented in the State government, and its only legal representative in the court.'" *Envtl. Prot. Agency (EPA) v. Pollution Control Bd.,* 372 N.E.2d 50, 51 (Ill. 1977) (quoting *Fergus v. Russel,* 110 N.E. 130, 143 (Ill. 1915)). Thus, the Illinois Attorney General, as chief legal officer of the State, "has the constitutional duty of acting as legal adviser to and legal representative of State agencies. He or she has the prerogative of conducting legal affairs for the State." *EPA,* 372 N.E.2d at 51.

[44] While the Attorney General's representation of the Illinois cases is accurate, his reliance on these cases is misplaced. A thorough review of the Illinois constitutional and case law history establishes that the Illinois Attorney General's powers stem from the Illinois Supreme Court's interpretation of the phrase "prescribed by law" as it appears in the Illinois constitution, and not from is designation as "Legal Officer."

[45] To begin with, the 1870 Illinois constitution created the office of Attorney General and provides that the Attorney General shall "perform such duties as may be prescribed by law." Ill. Const. of 1870, art. V, §1 ("The executive department shall consist of a Governor, Lieutenant Governor, Secretary of State . . . and Attorney General. . . . [who] shall perform such duties as may be prescribed by law"); *see People ex rel. Scott v. Briceland,* 359 N.E.2d 149, 153 (Ill. 1976) (recognizing the absence of the term "Legal Officer" in the 1870 constitution).

[46] The seminal case interpreting the 1870 constitutional provision with regard to the Attorney General's powers is *Fergus v. Russel,* 110 N.E. 130 (Ill. 1915). The court, construing the phrase "prescribed by law" as it existed in the 1870 constitution, rejected such language as limiting the Attorney General's powers to those specified by statute, and held that the term "law" includes common law. *Id.* at 143. The court specifically stated that "[t]he common law is as much a part of the law of this state, where it has not been expressly abrogated by statute, as the statutes, and is included within the meaning of this phrase." *Id.* Further, recognizing the common law history of the state, the court stated with respect to the powers of the Attorney General:

> Under our form of government all of the prerogatives which pertain to the crown in England under the common law are here vested in the people, and if the Attorney General is vested by the Constitution with all the common-law powers of that officer, and it devolves upon him to perform all the common-law duties which were imposed upon that officer, then he becomes the law officer of the people, as represented in the state government, and its only legal representative in the courts, unless by the Constitution itself or b some constitutional statute he has been divested of some of these powers and duties.

Id. The court in *Fergus* thus observed:

> By our Constitution we created this office by the common-law designation of Attorney General and thus impressed it with all its common-law powers and duties. As the

> office of Attorney General is the only office at common law which is thus created by our Constitution the Attorney General is the chief law officer of the state, and the only officer empowered to represent the people in any suit or proceeding in which the state is the real party in interest, except where the Constitution or a constitutional statute may provide otherwise. With this exception, only, he is the sole official adviser of the executive officers, and of all boards, commissions, and departments of the state government, and it is his duty to conduct the law business of the state, both in and out of the courts.

Id. at 145.

[47] The court in *Fergus* unequivocally established the Attorney General as an officer "with expansive powers which the General Assembly lacked the power to diminish." Shawn W. Denny, *History of the Office of the Illinois Attorney General,* http://www.illinoisattorneygeneral.gov/about/history.html, (last visited Feb. 8, 2005). *See Briceland,* 359 N.E.2d at 153 ("The rationale of the *Fergus* decision is that the 1870 Constitution granted the Attorney General all the powers associated with that office at common law, and that, while the legislature could add to these powers, the legislature could not reduce the Attorney General's common law authority.")

[48] For many years following, every Illinois case which addressed the Attorney General's authority and held that the General Assembly could not diminish the powers of the Attorney General, relied on the *Fergus* decision and its interpretation of the 1870 constitution. The 1970 Illinois

constitution "continued the Office of the Attorney General as it had been established under the 1870 Constitution." Denny, *supra.* In the 1970 constitution, the office was thus described: "the Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law." Ill. Const. of 1970, art. V, §15 West, WESTLAW through Sept. 15, 2004). Significantly, the term "chief legal officer" does not even appear in the 1970 Illinois constitution. In fact, in designating the Attorney General as "legal officer," the delegates had no intention to either enlarge or diminish the powers of the Attorney General as it existed in the 1870 constitution. Rather, the delegates acknowledged the *Fergus* decision, and desired the law to remain status quo. *See Briceland,* 359 N.E.2d at 156 (recognizing, after a lengthy review of the constitutional debate, that it is clear "the delegates intended to retain the holding of *Fergus* that the Attorney General is 'the only officer empowered to represent the people in any suit or proceeding in which the State is the real party in interest, except where the constitution or a constitutional statute may provide otherwise.'") (quoting *Fergus*, 110 N.E. at 145)).

[49] We decline to adopt the Illinois court's interpretation of its constitution. First, only two relevant words in the language in our Organic Act can be found in the 1970 Illinois constitution: legal officer. It is therefore unreasonable to assume, as the Attorney General asserts, that "the model for Guam's Attorney General was based upon the Illinois Attorney General Constitution," and even more unreasonable that this court should feel compelled to follow the Illinois court's interpretation. *See* Appellant's Opening Brief, p. 15 (June 14, 2004).

[50] Second, the Illinois line of cases was based on the 1870 constitution's language that the Attorney General had duties as "prescribed by law." Because that specific phrase,

in the context of the Illinois constitution, was presented to Congress through the testimony provided by the former Compiler of Laws, and obviously rejected, the *Fergus* case and all other cases which follow it, are completely inapplicable to the case before us.

[51] Third, the term "legal officer" as used in the 1970 Illinois constitution was not meant to "clarify" the powers of the Attorney General. In other words, the Illinois Attorney General's common law powers derive from the phrase "prescribed by law" and not "legal officer." In determining whether the Attorney General of Guam, as Chief Legal Officer, is vested with common law powers which cannot be diminished by the Legislature, Illinois cases in inapplicable as the use of the term "legal officer" had no effect on the state of Illinois law with regard to the source of the Attorney General's common law powers.

[52] Finally, the Illinois court's interpretation has been regarded as one which does not follow the general rule, but rather gives "the Attorney General of Illinois . . . perhaps the broadest power of all the Attorney General within the United States." David Edward Dahlquist, *Comment, Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Rules,* 50 DePaul L. Rev. 743, 765 (2000). Not surprisingly, the Illinois interpretation has received criticism. *See* EPA, 372 N.E.2d at 51 (where the Illinois Supreme Court noted that the court has not wavered since the *Fergus* decision despite criticism regarding the power granted to the to the Attorney General).

[53] The Attorney General also relies on cases from courts in Mississippi, Alabama, Washington, Indiana, California and Florida. However, GIAA correctly points out that in the cases cited from the jurisdictions of Mississippi, Alabama,

Washington and Indiana, the courts found that the respective state agency or board in question was without express statutory authority to retain independent counsel to represent its interests, and accordingly upheld the Attorney General's authority to represent the state entity. *See Wade v. Miss. Coop. Extension Serv.*, 392 F.Supp 229, 231 (N.D. Miss. 1975) (observing that under a Mississippi statute, the Attorney General has "the sole power to bring or defend a lawsuit on behalf of a state agency") (quoting Miss. Code Ann. §7-5-1 (West, WESTLAW through end of 2004 Regular and First Ex. Sess.)); *Ex Parte Weaver*, 570 So. 2d 675, 678-79 (Ala. 1990) (observing Alabama statute which states that "[a]ll litigation concerning the interests of the state, or any department thereof, shall be under the direction and control of the attorney general . . . .") (quoting Ala. Code §36-15-21 (West, WESTLAW through end of 2004 Regular Sess.)); *State v. Gattavara*, 47 P.2d 18, 21 (Wash. 1935) (observing that Washington law "did not give authority to departments to institute actions in their own right, but only in conjunction with the authority of the Attorney General," and further, under statutory law, "the Attorney General shall be the legal adviser to the joint board and represent it in all proceedings") (quoting Rem. Rev. Stat §7697)); *Banta v. Clark*, 398 N.E. 692, 693 (Ind. Ct. App. 1979) (observing that under Indiana law, "[n]o agency. . . shall have the right to name, appoint, employ or hire any attorney. . . to represent it or perform any legal services on behalf of such agency ... without the written consent of the attorney general.") (quoting Ind. Code §4-6-5-3 (West, WESTLAW through end of 2004 Regular Sess.)).

[54] In contract to the above jurisdictions, the Guam Legislature has expressly authorized GIAA to retain outside counsel to provide legal advice and represent its legal interests in any forum. *See* 12 GCA §1108(a) and (c). In fact, the agency is only required to receive the Attorney

General's approval of the legal services contract with respect to form and legality. *See* 5 GCA §5150.

[55] In California, state agencies "may employ special counsel to protect its rights, unless specifically prohibited from so doing by statutory or charter provisions. . . ." *State Comp. Ins. Fund v. Riley*, 69 P.2d 985, 987 (Cal. 1937). However, in *Riley,* the California Supreme Court found that the civil service laws specifically prohibited the retention of independent counsel, and thus found in favor of the Attorney General. *Id.* at 987. Again, in contrast, Guam statutes expressly allow GIAA to retain outside counsel. *See* 12 GCA §1108(a) and (c).

[56] Finally, the Florida case relied upon by the Attorney General does not provide support for the Attorney General's position. Rather, it supports GIAA. The case of *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 271 (5th Cir. 1976), was correctly cited by the Attorney General for the conclusion that, at common law, the Attorney General's powers included instituting, defending or intervening "in any litigation or quasi-judicial administrative proceeding which he determines in his sound official discretion involves a legal matter of compelling public interest." However, the Fifth Circuit Court also observed that such powers may be limited by the legislature. *Id.* at 268 (recognizing that "[t]here is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires."). This was true even where the constitution explicitly designated the Attorney General as Chief State Legal Officer of the state. *See* Fla. Const., art 4, §4(a) (West, WESTLAW through Nov. 2, 2004) ("There shall be a cabinet composed of an attorney general . . . they shall exercise such powers and perform such duties as may be prescribed by law.); Fla.

Const., art 4, §4(b) (West, WESTLAW through Nov. 2, 2004) ("The attorney general shall be the chief state legal officer.").

b. Other Jurisdictions

[57] Contrary to the Illinois line of cases which hold that the term "prescribed by law" means that the Attorney General has all common law powers which cannot regulated by the legislature, some courts have found that where the constitution provides that the attorney general shall have duties "as provided by law," such language is construed as completely removing all common law powers of the attorney general. *See In re Estate of Sharp,* 217 N.W.2d 258, 262 (Wis. 1974) (recognizing that "Wisconsin, unlike numerous states, has specifically circumscribed the powers and duties of the office of the Attorney General. Art. VI, Sec. 3 of the Wisconsin Constitution limits those powers and duties to those 'prescribed by law.' This constitutional principle has been interpreted by the courts in numerous decisions as removing from the office of the Attorney General any powers and duties which were found in that office under common law."); *Ariz. State Land Dep't v. McFate,* 348 P.2d 912, 914 (Ariz. 1960) (noting that "Article V. Section 1 Arizona Constitution, establishes the office of the Attorney General within the Executive Department of the State. Section 9 thereof provides: 'the powers and duties of Attorney General, shall be as prescribed by law.' This Court has held that the 'law' referred to in Article V, Section 9, is the statutory law of the State and not the common law."). Today, a mere seven states deny the Attorney General *all* common law powers. Dalhlquist, *supra* at 763. They include Arizona, Indiana, Iowa, Louisiana, New Mexico, South Dakota, and Wisconsin. *Id.* at n.148.

[58] In other states whose constitutions similarly include the phrase "prescribed by law" or a similar phrase, courts have held that while the Attorney General possesses common law powers, such powers may be modified by the Legislature. *See Johnson v. Commonwealth,* 165 S.W.2d 820, 829 (Ky. 1942) (recognizing that the state constitution authorizes the legislature to "prescribe" duties to the Attorney General and holding that "while the Attorney General possesses all the power and authority appertaining to the office under common law and naturally and traditionally belonging to it, nevertheless the General Assembly may withdraw those powers and assign them to others or may authorize the employment of other counsel . . . ."); *Shevin,* 526 F.2d at 270 (recognizing that, while the Attorney General possesses common law powers, such powers may be modified by statute); *State ex rel. Derryberry v. Kerr-McGee Corp.,* 516 P.2d 813, 818-19 (Okl. 1973) (holding that "[i]n the absence of express statutory or constitutional restrictions, the common law duties and powers attach themselves to the office as far as they are applicable and in harmony with our system of government.").

[59] Unlike a majority of jurisdictions, section 1421g of the Organic Act provides that the Attorney General shall be the chief legal officer of the government of Guam, however, aside from this, the Organic Act is silent as to the Attorney General's duties, or, for that matter, whether the duties are limited to that prescribed or provided by law. In states where the constitutions do not limit or define the attorney general's powers through the phrase "prescribed by law" or a similar phrase, it has been held that "[t]he absence of a [constitutional] provision for specific powers for the attorney general . . . vests the office with all of the powers of the attorney general at common law." *State ex rel. Nixon v. Am. Tobacco Co.,* 34 S.W.3d 122, 136 (Mo. 2000) (en banc) (interpreting the provision of the constitution which simply

provided that "[i]n addition to the governor and lieutenant governor, there shall be [an] attorney general.") (second bracket in original); *Bd. Of Pub. Util. Comm'rs v. Lehigh Valley R.R. Co.,* 149 A. 263, 266 (N.J. 1930) (citing with approval a New Jersey case that stated: "[e]xcept as modified by constitutional or statutory regulation, his [the attorney general's] functions here are similar to those exercised by the representative of the crown. . . ."); *Superintendent of Ins. v. Att'y Gen.,* 558 A.2d 1197, 1200 (Me. 1989) ("The Attorney General, in this State, is a constitutional officer endowed with common law powers. As the chief law officer of the State, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and ma institute, conduct, and maintain all such actions and proceedings . . .") (citation omitted); *Watson v. Caldwell,* 27 So. 2d 524, 529 (Fla. 1946) (holding that the Internal Improvement Fund had the statutory authority to retain outside counsel and not use the Attorney General as counsel, despite his designation in the Florida constitution as Chief Legal Officer).[6]

[60] However, in these states, it is also held that while the attorney general's powers are broad, they are not without limit, and "[a]s with other common law precepts, the attorney general's authority can be restricted by a statute enacted specifically for the purpose of limiting his power."

---

[6] Florida's constitution, like Guam's Organic Act, designates the Attorney General as the Chief Legal Officer. Fla. Const., art 4, §4(b) (West, WESTLAW through Nov. 2, 2004). However, Florida's constitution also states that the Attorney General's duties shall be "prescribed by law." Fla. Const., art 4, §4(a) (West, WESTLAW through Nov. 2, 2004). As previously discussed, in states where the constitutions *do not* limit or define the Attorney General's powers, courts have held, *consistent* with the Florida (any many other states similarly defining the term "prescribed by law"), that the Attorney General has common law powers which may be modified by statute.

Am. Tobacco, 34 S.W.3d at 136. It is also noted that the statute must actually limit the attorney general's powers, and that "[a] grant by statute of the same or other powers does not operate to deprive him of those belonging to the office under the common law, unless the statute, either expressly or reasonable intendment, forbids the exercise of powers not thus expressly conferred." *Id.* (quoting 6 C.J. 816).

[61] This preceding approach, applied in the absence of constitutional language defining or limiting the Attorney General's powers, is consistent with the line of cases holding that the legislature may add to or reduce the common law powers of the Attorney General. Indeed, it has been recognized that "[i]n many jurisdictions, the attorney general of a state, in addition to the powers conferred and duties imposed by statute, is charged with all the common-law powers and duties pertaining to the office as well, except insofar as they have been expressly restricted or modified by statute or the state constitution." 7 Am. Jur.2d *Attorney General* §7 (2004); *see also* Dahlquist, *supra* at 764 (stating that most jurisdictions follow the general rule that "unless a state legislature expressly terminates the common law powers of the Attorney General, it can be assumed that such powers are part of the office.").

[62] We therefore adopt the general rule and hold that the Attorney General, as Chief Legal Officer, in addition to the powers conferred and duties imposed by the Legislature, is charged with all the common-law powers and duties pertaining to the office, except insofar as they have been expressly restricted or modified by statute. Stated another way, "the common-law powers and duties of the attorney general are subject to increase, alteration, or abridgment b the legislature. . ." 7 Am. Jur.2d *Attorney General* §8 (2004). We note that this result is consistent with Title 5 GCA

§30103, which sates that the Attorney General has common law powers except as limited by statute.

c. Title 12 GCA §1108(a) and (c)

[63] Section 1108(a) and (c) expressly states that GIAA may appoint an attorney, and that such attorney may advise its officers, or the agency, on legal matters and represent the agency in any forum. Title 12 GCA §1108(a) and (c) ("The [GIAA] Board may also appoint . . . an attorney. . . [who] shall advise the Board and the Executive Director on all legal matters to which the Authority is a party or in which the Authority is legally interested, and may represent the Authority in connection with legal matters before the Legislature, boards and other agencies of the Territory or of the United States. The Attorney for the Authority shall represent the Authority in litigation concerning the affairs of the Authority."). Moreover, Title 5 GCA §30109(c) states that the Attorney General may "[c]onduct on behalf of the government of Guam all civil actions in which the government is an interested party; *provided that those branches, departments or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General.*" 5 GCA §30109(c) (emphasis added).

[64] Accordingly, we hold that Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109 are valid exercises of the Legislature's power to remove the common law power of the Attorney General to act as legal counsel to represent to the interests of GIAA, and do not violate the Organic Act.[7]

---

[7] While we recognize the legislative authority, in this instance, to withdraw common law powers from the Attorney General, we note that at least one court had held that although the legislature "may withdraw those powers and assign them to others . . . the office may not be striped of *all* duties and rights so as to leave it an empty shell . . . ." *Johnson v. Commonwealth*, 165 S.W.2d 820, 829 (Ky. 1942) (emphasis added).

[65] It is clear that the Attorney General has the authority to review contracts with respect to their legality and form pursuant to Title 5 GCA §5150. However, when determining whether to approve or disapprove contracts, the Attorney General may only consider the legality and form of the proposed contract. *See Citizens Energy Coalition of Indiana v. Sendak*, 594 F.2d 1158, 1162 (7th Cir. 1979); *see also State ex rel. Fahlgren Martin, Inc. v. McGraw*, 438 S.E.2d 338, 344-345 (W. 'Va. 1993) (holding that reviewing a contract for "'form' does not include matters extrinsic to the actual contract"). Thus, the Attorney General has the legal duty to approve a contract which is lawful as to form and content. *See Sendak*, 594 F.2d at 1162 (holding that the Attorney General has no discretion to reject a contract that is lawful and correct in form).[8]

[66] In light of the constitutionality of Title 12 GCA §1108(a) and (c) and Title 5 GCA §30109, we hold that the Attorney General has a legal duty to approve the legal services contract between GIAA and the Mair firm as to form and legality, and further, GIAA has a clear, present and beneficial right to the performance of the Attorney General's duty. We therefore affirm the trial court judgment granting mandamus relief to GIAA.[9]

---

[8] We hesitate to call the review of a contract for form and legality a mere ministerial act or duty. *See Mother Goose Nursery Schs., Inv. v. Sendak*, 770 F.2d 668, 674 (7th Cir. 1985). However, once the Attorney General reviews a contract and determines that it is lawful as to form and content, a legal duty arises to approve the proposed contract. The Attorney General has not alleged that the contract at issue in this case is not lawful as to form or content.

[9] The trial court's judgment ordered the Attorney General to represent all executive line agencies. GIAA in its opening (opposition) brief agrees with such conclusion and raises several points regarding the Attorney General's duty to represent the line agencies. However, the Attorney General, as appellant, does not appeal from that portion of the trial court's judgment, nor does he address such argument in his Reply Brief.

IV.

[67] We hold that the Attorney General, as Chief Legal Officer, is charged with all the powers and duties pertaining to the office at common law, except insofar as they have been expressly restricted or modified by statute. Accordingly, we hold that Title 12 GCA §§1108(a) and (c) and Title 5 GCA §30109 are valid exercises of the Guam Legislature's constitutional powers granted by the Organic Act. The trial court's Judgment granting mandamus relief to GIAA is **AFFIRMED.**

It should be noted that GIAA's petition for writ of mandate requested no such holding from the trial court, nor was it addressed in the trial court's decision and order which formed the basis for the final judgment granting mandamus relief. Moreover, the interests of the various line agencies are not represented by any party in this proceeding. Thus, we do not address such issues in this opinion.

IN THE SUPERIOR COURT OF GUAM

A.B. WONPAT GUAM INTERNATIONAL AIRPORT, by and through its Board of Directors,	)	SPECIAL PROCEEDING CASE NO. SP0055-03
Petitioner,	)	
vs.	)	DECISION AND ORDER ON WRIT OF MANDATE
DOUGLAS B. MOYLAN, Attorney General of Guam,	)	
Respondent.	)	

BACKGROUND

This matter came before the Court on the 28th of March, 2003, on the Petitioner's petition for Writ of Mandamus. The Petitioner filed this Writ of March 7, 2003 and the Respondent filed an Ex-parte Motion to Stay on March 14, 2003 and it was heard on the same day. The Respondent filed an Opposition to the Writ of Mandamus of March 21, 2003. A Reply Memorandum in Support of the Writ was filed on March 25, 2003, by the Petitioner. An order denying the Motion to Stay was filed on April 14, 2003. Both parties submitted Supplemental Briefs on April 18, 2003. After hearing the arguments of both parties, the Court took the matter under advisement. The Court now issues its Decision and Order.

DISCUSSION

The Writ of Mandamus seeks relief as set forth in 7 GCA §31202 and §31203. The petitioner argues that the Guam International Airport Authority (GIAA) is a government agency that was created pursuant to Title 12 GCA §§1101. The Board of Directors oversees the operations of the GIAA. The argument is that under 12 GCA §1108(a) and (d), the GIAA has the express statutory right to retain independent legal counsel. Independent legal counsel may be retained, in place of the Attorney General, as stated in 5 GCA §30109. The Petitioner agrees that the AG must approve all contracts for professional services and is only permitted to participate in the negotiations of the contracts "upon the request" of the government agency. The AG's review of professional service agreements is limited to an inquiry as to the "correctness" of from and "legality" in order to confirm that the "required procedures" were followed toward the contract. On January, 2003, the Attorney General sent a letter to GIAA stating that prior to any private attorney being retained his approval was needed. The Attorney General also stated that the GIAA was the Attorney General's client and private counsel could not communicate with the Government of Guam without his office approval.

The GIAA retained the law firm of Mair, Mair, Spade and Thompson, as an independent counsel. The contract was signed by the Chairman of the Board, the Executive Manager and a representative of the firm. The contract was sent to the Attorney General's Office for review and signature, on March 3, 2003.

The Attorney General's office indicated that he does not intent to allow the GIAA the statutory right to retain the law firm as independent counsel. The GIAA argues that the

Attorney General has disregarded his statutory obligation by failing to permit the GIAA to retain counsel and by failing to approve the contract as required by law.

ANALYSIS

The Petitioner in this action first argues that the Attorney General's powers may be limited by the legislature. The Petitioner cites to cases that show that the Legislature may limit the authority of the Attorney General as well as "take away" the powers of an Attorney General and vest them elsewhere.

The Petitioner cites to Tarantino v. Board of Regents of the University of Guam, in which the Superior Court of Guam held that the powers of the Attorney General may be limited by statute:

> The statute prescribing the common law powers of the Attorney General explicitly states that 'the Attorney General shall have ...those common powers...unless expressly limited by any law of Guam to the contrary.' 5 GCA 30103...A review of the 1998 amendments to the Organic Act and the Organic Act itself grants no enhancement to the powers of the newly created Chief Legal Officer of Guam. Civil Case CV1455-00, Decision and Order at pp.9-10 (Super.Ct. Guam Dec.5, 2000).

The Petitioner notes that there is nothing in the plain language of the 1998 Amendments to the Organic Act that suggests that the powers of the Guam Legislature were being curtailed in relation to an elected Attorney General, if anything it expanded the powers of the legislature. The

Legislature has more power over the Attorney General as opposed to other state elected Attorney Generals. The Guam Legislature may decide whether to have an elected or appointed Attorney General, decide upon the procedures by which the Attorney General may be removed "for cause".

The second issue raised by the Petitioner is that the Legislature may permit government agencies to retain independent counsel. The Petitioner cites to Hansen v. Utah State Requirement Board, 652 P.2d 1332 (Utah 1982), in which the court stated, "As to each defendant, the Legislature has conferred specific statutory authority authorizing the employment of independent counsel ... Thus, the authority for each defendant to hire independent counsel has a clear statutory foundation."

They also cite to Fund Manager, Public Safety Retirement System v. Superior Court of the State of Arizona, 731 P.2d 620 (Ariz. 1986), in which the Attorney General assisted the private counsel to submit all opinions and advice to the Attorney General for review. The court stated:

> The factual issue in this special action is whether the attorney general may require, as a condition to approval of the fund manager's legal representation by private counsel, the fund manager's agreement that its private counsel will submit all options and advice to the attorney general fro review, and that the fund manager may not commence any legal action or appeal any decision without the attorney general's prior approval. We hold that the attorney general may not imply such condition
>
> Moreover, the attorney general's interpretation of the statute would

> burden any private attorney or firm retained by the fund manager with a continuing ethical conflict between his duty to hold inviolate the confidences of his client and the need to disclose such information to the attorney general in aid of the attorney general's asserted supervisory function.

The third issue presented is that the GIAA by statute has the authority to retain independent counsel. In 12 GCA §1108(a), (d), the legislature has said:

> The Board may also appoint a Treasurer, a Comptroller and an attorney, all of whom shall serve a the pleasure of the Board...The attorney, who must have been admitted to the practice of law in Guam, shall advise the Board and the Executive Director on all legal matters to which the Authority is a party or in which the Authority is legally interested, and may represent the Authority in connection with legal matters before the Legislature, boards and other agencies of the Territory or of the United States. The attorney for the authority shall represent the Authority in litigation concerning the affairs of the authority.

The Attorney General must approve a contract for legal services. The Attorney General may only participate in the negotiations of the contract "upon the request of the government officer or agency primarily responsible fro such negotiations. 5 GCA §5121(b) The Attorney General is limited to an inquiry as to the "correctness of their form" and "legality" in order to confirm that the required procedures were followed in the awarding of the contract.

2 GAR 2113 states:

> The Attorney General shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality. In making such determination of legality, he may require any or all agencies involved in the contract to supply him with evidence that the required procedure precedent to executing the contract werer carried out.

The Legislature in 5 GCA §30109(c) stated: "those branches, department or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General."

These statutes show that the GIAA is statutorily allowed to bring in independent counsel for their representation and the Attorney General must approve the legality of the contracts.

The fourth issue is the infringement of the Attorney General upon the Governor's power to organize the executive branch. The Petitioner in this case refers to the Organic Act and to 48 USCS 1422 as express acts giving the governor the power to organize the executive branch. The Governor is responsible for the faithful execution of the laws of Guam, not the Attorney General. The Petitioner cites to In re Governor, 2002 Guam 1 (Sup.Ct. Guam 2002) which acknowledged that the executive power of Guam was vested exclusively in the "Governor of Guam" pursuant to the Organic Act

The Petitioner states that a writ of mandamus is the proper remedy in this case. This relief is available through 7 GCA §31202, which would compel the Attorney General to

perform "an act that the law specially enjoins, as a duty resulting form an office, trust, or station." Section 31203 provides mandamus relief "in all cases where there is not a plan, speedy. And adequate remedy in the ordinary course of law."

The Respondent argues that the Writ of Mandamus is not a proper remedy. The Bank of Guam v. Reidy, 2001 Guam 14, at 14, 201 WL 686949 (Sup. Ct Guam 2001), sets out four factors which a court must consider in whether to issue an writ of mandamus against a government entity:

> (1) Is the respondent an inferior tribunal, corporation, board or person?
>
> (2) Has the respondent failed to perform a clear, present duty, having the legal authority and present ability to do so?
>
> (3) Does the duty entail ministerial action, the assumption of jurisdiction, the exercise of discretion or the abuse of discretion?
>
> (4) Does the petitioner have a clear, present right and beneficial interest in the performance of the respondent's duty?

The Respondent's first argument is that the office of the Attorney General was created by the Organic Act and thus cannot be limited by the Legislature. The Respondent asks the Court to look at the intention of the framers of this amendment to the Organic Act. The Act was amended for two reasons: 1) to create a position of Attorney General with inherent common law powers and, 2) to give the local legislature the option to make the position of Attorney General elected rather than appointed by the governor. The primary objective of the 1998 amendment was to organically create a position that would be immune form interference

from both executive and the legislative branches. The history starts with the Legislature attempt to move the control of the Attorney General from the executive branch to the legislative branch. This would not meet the objective of making the office independent.

The Legislature adopted Resolution No. 186, 23rd Guam Legislature, on Oct 1, 1997 which called for Organic Act amendments creating the office of the Attorney General. This resolution placed the Attorney General under the legislative branch. This position was challenged by many other senators. Subsequently legislative history show that the reason for the amendment was not for an elected Attorney General but to allow the Legislature to decide whether or not to have an elected Attorney General. The Attorney General has now been established pursuant to the Organic Act, therefore the Guam Legislature cannot eliminate the office. This makes the office immune to local executive or legislative interference.

The Respondent cites that the "Chief Legal Officer" of the state is endowed with common law powers, which extends the Attorney General's powers beyond those created by statutory law. State of Illinois v. Bristol-Myers Co., 470 F.2d 1276 (7th Cir. 1972), citing Hunt v. Chicago House and Dummy Ry. Co., 12 N.E. 176, 181 (Ill. 1887), for the proposition that a language of grant is not restricted to statutory law.

Thus in states where the office of the Attorney General is constitutionally created, such as Guam, the Attorney General's powers are regarded as powers that could not be diminished by local legislation. People ex rel. Castle v. Daniels, 132 N.E.2d 507, 509 (Ill. 1956).

The Respondent goes further to cite to 5 GCA §30103 and §30109. The powers found therein are not exclusive; section 30103 provides, "the Attorney General shall have, in addition to the powers expressly conferred upon him by this chapter, those common law powers which include but are not limited to...unless expressly limited by any law of Guam to the contrary" This statute expressly states that the Attorney General powers were not limited to those enumerated in the statute, Thus the argument that the Attorney General is subject to the powers granted to him by the Legislature is not true.

This is an issue of first impression on Guam and depends on the nature of the office as it was created by Guam and its people. The Petitioner asks this court to rely on Tarantino v. Board of Regents of the University of Guam, Superior Court Civil Case No. CV1455-00, Decision and Order of December 5, 2000. The Respondent argues that this decision was vacated by the Supreme Court of Guam. Because the Chief Justice ordered the case vacated and dismissed; this renders the case as if it did not exist.

The position of the Attorney General is a matter of a constitutional right and however he is selected, is the Chief Legal Officer of Guam and inherits the responsibility of heading the legal affairs of Guam.

The next argument is whether the legislature may permit government agencies to retain independent counsel. The law that this comes from pre- dates the 1998 Amendment to the Organic Act. This creates an issue of statutory construction, which must be resolved by looking at the subsequent law. The federal law designating the Attorney General as the Chief Legal Officer preempts the local law. The Legislature should address this issue within the changes of the Organic Act.

The Respondent then goes on to state that the Board has no power to enter into a "legal services contract" with an "independent contractor." The attorney appointed by the Board is an employee of the board. 4 GCA §4102 provides:

> Classified and Unclassified Services. All offices and employment in the government of Guam, except for the employment as academic personnel of the Guam community College and the University of Guam, as the term academic personnel is defined in enabling laws of GCC and UOG, shall be divided into classified and unclassified services as follows:
>
> (a) The unclassified service shall include the positions of: ...
>
> (10) All offices and employment made, by law, to be at the pleasure of any board, commission or office.

This is in contrast to the interpretation by the Petitioner of 12 GCA §1108. Thus the attorney appointed by the Board is in the classified service. The Attorney General has no legal duty to approve a contract for legal services entered into by the airport with an independent contractor.

The law governing the Government's contractual relations with persons providing personal services to the Government contemplate two different types of contractual relations, and are found in two different titles of the Guam Code.

The first is the personnel laws, which are found in Title 4, and govern those relations wherein, lays an

employer- employee relationship between the Government and the person providing the personal services.

The second is found in the procurement laws under Title 5, and govern those contractual relations in which the person providing the services to the Government is an independent contractor.

12 GCA §1108, by providing for an appointment of an attorney in the unclassified service, provided for the appointment of an employee, not an independent contractor. What is authorized is a "contract of employment" in the unclassified service; not a contract for legal services covered by the Procurement laws. 5 GCA §5121.

The unclassified service includes only persons providing personal services as employees and does not include independent contractors, is indicated by the statutes. 4 GCA §2103.15 makes a distinction between contracts for personal services covered by the procurement laws, and employment in the unclassified services.

4 GCA §2103.16 drew a distinction between a "contract of employment between the government of Guam and any employee or officer in the unclassified service," on the one hand, and the "contracts not involving an employment relationship with the Government of Guam," on the other. The requirements is that contracts for employment be "specifically permitted by law" or be "for a physician or dentist" does not apply to "independent services" by retired employees or "independent contracts" by persons who do not wish to be full time employees. Thus the airport has no authority to enter into a contract with an attorney, as an independent contractor a mandamus does not lie to compel the Attorney General to approve such a contract.

The final argument presented is that the Attorney General's powers do not infringe on the Governor's ability to reorganize the Executive Branch. The Respondent asserts that these are not reorganization decisions. The reorganization to which the Organic Act applies are those contemplated in such laws as 5 GCA 11103, which defines reorganization to include the moving or abolishing of agencies and likewise.

The Court acknowledges the submission of the supplemental briefs and after review of the briefs and hearing of arguments, the Court now issues this decision and order.

Both parties stipulate that this is not a pre-emption case. See Transcript March 28, 2003.

The Court agrees that the powers of the elected attorney general may be limited by legislative action as was stated in Johnson v. Commonwealth, et al., 165 S.W.2d 820, 826 (Ky. 1942) as well to limit the commencing of litigation as in Estate of Sharp, et al. v. State, 217 N.W.2d 258, 262 (Wis. 1974).

The 1998 Amendments to the Organic Act and the legislative history does not allow any enhancements to the powers of the Attorney General. The Organic Act contains no language that either diminishes or expands the power of the Attorney General. The Legislature may still enact legislation to expand or limit the powers of the Attorney General.

5 GCA §30103 states:

Common Law Powers of the Attorney General.

> The Attorney General shall have, in addition to the powers expressly conferred upon him by this chapter, those common law powers which include, but are limited to, the right to bring suit to challenge laws which he believes to be unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, **unless expressly limited by any law of Guam to the contrary.** The Attorney General may permit attorneys admitted to practice in Guam or licensed collection agents to collect accounts or other obligations owing to the Government of Guam, or to nay agency or instrumentality thereof, if such procedure would be in the interest of the Government and expedite the collection of said account or obligation. Any agency or instrumentality not operating under yearly appropriations from the Legislature may retain counsel of its choice for the collection of obligations in the same manner as it may be permitted to retain counsel in other matters as permitted by enabling legislation. Guam Memorial Hospital may permit the Attorney General or attorneys admitted to practice in Guam and agents or licensed collection agents to collect accounts or other obligations owing to Guam Memorial Hospital. (emphasis added)

The Guam Legislature has passed specific statutes, which are enacted prior to the 1998 Amendments to the Organic Act that may seem to have a limitation on the

Attorney General. The Court needs not to interpret these statutes but to decide if these statutes are still valid.

Though the Attorney General has requested that this court produce an interpretation of the definition and powers of the "Chief Legal Officer" for the "Government of Guam", the Court shall rule only to the issue in this case which is whether the Guam Legislature has expressly permitted autonomous agencies to retain independent legal counsel.

The law of Guam is expressly stated in 2 GAR 2113, in which it states:

> Duties of the Attorney General. The Attorney General...shall serve as legal counsel and provide necessary legal services to the Policy officer and the General Services Agency. The Attorney General shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality. In making such determination of legality, he may require any or all agencies involved on the contract to supply him with evidence that the required procedures precedent to executing the contract were carried out.

12 GCA §1108(a) states:

> Treasurer, Comptroller, Attorney. (a) The Board may also appoint a ... And an attorney, all of whom serve at the pleasure of the Board. Their duties and compensation shall be fixed by the Board.

5 GCA §5121(b) states:

> Authority to contract for Certain Services and Approval of Contracts; Approval of Contracts for legal Services. No contract for the services of legal counsel in the Executive Branch shall be executed without the approval of the Attorney General. Nothing in this section or chapter shall preclude the Attorney General or his designee from participating in the negotiations for any contract upon the request of the government officer or agency primarily responsible for such negotiations.

The Court finds a Writ of Mandamus is the proper remedy in this case. The Legislature has permitted that the autonomous agencies may retain legal counsel and has required that the Attorney General review all potential professional contracts for correctness of their form and for legality in order to confirm that the required procedures were followed. The Petitioner has the authority to retain its own legal counsel and may request that this Writ be granted because the Respondent has failed to exercise its ministerial duty to review the legal contract thus depriving the Petitioners of its own legal representation.

CONCLUSION

The Court finds that the Petitioner's Writ of Mandate is **GRANTED** and the Attorney General is ordered to approve the legal service contract for the GIAA and the other autonomous agencies as directed by statute, unless the Attorney General can show that the contract has question as to the correctness to form or to the legality of the contract and that the required procedures were followed by the agency. The Attorney General is ordered to approve all such

contracts if valid and to proceed with the legal representation of the line agencies of the executive branch.

Dated this 9th day of May 2003.

s/ Alberto C. Lamorena, III
HONORABLE ALBERTO C. LAMORENA, III
Presiding Judge
Superior Court of Guam

IN THE SUPERIOR COURT OF GUAM

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY by and through its Board of Directors,	)	SPECIAL PROCEEDINGS CASE NO. SP0055-03
Petitioner,	)	**FINAL JUDGMENT GRANTING PEREMPTORY WRIT OF MANDAMUS**
vs.	)	
DOUGLAS B. MOYLAN Attorney General of Guam,	)	
Respondent.	)	

TO THE RESPONDENT DOUGLAS B. MOYLAN, ESQ., ATTORNEY GENERAL OF GUAM:

This matter came on for hearing before this Court on Friday, March 28, 2003. The Court having reviewed the pleadings, declarations, and exhibits, and having heard the arguments of counsel, rendered a Decision and Order on May 12, 2003, granting the Petitioner's Writ of Mandate. The Peremptory Writ of Mandamus was issued on July 1, 2003.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that a Peremptory Writ of Mandamus be issued to Respondent and that he be ordered to approve the legal service contracts for the Petitioner and the other autonomous agencies as directed by statute. Pursuant to Title 2, Guam Administrative Rules and Regulations § 2113, the Respondent's review of the professional services agreements

is limited to an inquiry as to "correctness or their form" and "legality" in order to confirm that the "required procedures" were followed to award the contract. The Respondent is further ordered to proceed with the representation of the line agencies of the Executive Branch of the government of Guam.

Dated: January 29, 2004.

s/ Alberto C. Lamorena, III
HONORABLE ALBERTO C. LAMORENA, III
Presiding Judge, Superior Court of Guam

APPROVED AS TO FORM:

OFFICE OF THE ATTORNEY GENERAL

By:
B. ANN KEITH
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
Territory of Guam
Compiler of Laws Division

April 1, 1997

Honorable Robert Underwood, MC
House of Representatives

FAX: Guam 477-2587
Washington, DC 202-226-0314

Dear Congressman Underwood,

Here are my comments on your proposed amendments to the Organic Act:

1. Unfortunately your proposal with respect to education will not solve the present lawsuit. The issue being litigated now is that other provisions of the Organic Act establish three branches of government, the general (not specific) supervision of the Governor over the Executive Branch and the power of the Legislature to appropriate funds. DOE is arguing that the existing language overrides these basic structures of government, enabling a fourth branch, totally separate and apart from the executive, to exist and to be funded without any input from the Executive. Some recent proposals, one of which was declared unconstitutional at the trial level, would have automatic appropriations if the Legislature did not object within 45 days. Unless the education sections are specific, I see no end to suits and disputes.

Therefore, I suggest that your amendment specify whatever structure you wish to propose, en elected board; an state-level board under the Governor with elected district boards (like in the US) to be created by the Legislature; or whatever. You need to be specific if you are to avoid more litigation. Indeed, your proposal would seem to indicate that public education could be created totally separate and apart fro the government. Is that your intent?

2. Your amendment regarding the Attorney General is very welcome. However, it goes only one-third of the way. Section 1421g(c) (Organic Act) provides for a Public Prosecutor:

> (c) Office of Public Prosecutor: Office of Public Auditor. The Government of Guam may by law establish an Office of Public Prosecutor and an Office of Public Auditor. The Public Prosecutor and Public Auditor may be removed as provided by the laws of Guam.

On reason why the law was never implemented was that it would, *de facto* require a split of the Attorney General's Office. Our experience under the 16th Legislature (before it was declared inorganic) was not all good. Political was not removed from the office and never will be. Another reason for ignoring this law is that it does not provide any specific powers, nor means for appointment, and hence no local consensus.

I have always been of the opinion that the means of appointment is far less important than the tenure of office. We do not elect federal judges, but their independence is assured through other mechanisms. Yet an elected Attorney General would not

necessarily be bad, though by no means would anything get solved by such a change. Now that person would have a personal agenda to pursue, as well as that of the general government. I saw this shift when I was representing both the appointed and later, the first elected Board of Education. Also, the position, if you mention it at all, must be created by the Organic Act, not just permitted. Permission would permit the creation of another office with lesser powers to get around the fact that the Attorney General is the legal officer for the Government of Guam – and there are many who would do just that! The Organic Act should stop games playing as much as possible, not increase it.

The Constitution of Illinois is an excellent example of a very good Attorney General. Modifying the concepts found there for Guam (unicameral legislation, etc.), I suggest the following changes to your proposed bill:

> "(d)(1) There shall be with the Executive Branch of the Government of Guam an Attorney General, who shall be [elected by the voters of Guam] [appointed b the Governor with the advice and consent of the Legislature]. The Attorney General shall server for a term [{if elected} commencing at the same time as the term of the Governor of Guam and ending at the same time] [{if appointed] ending at the same time as the term of office of the appointing Governor, but the Attorney General may be removed

from office in the same manner as may be the Governor of Guam.] [{If appointed} The Governor may remove the Attorney General, but only for cause provided in law, or if he be convicted of a felony or a misdemeanor involving moral turpitude. However, the Attorney General may appeal such removal t the Supreme Court of Guam.]

(2) The Attorney General shall be the legal officer of Guam, and shall be the Public Prosecutor of Guam, and shall have the duties and powers that may be prescribed by law."

The material in brackets [...] are alternatives depending upon the choice as to method of appointment. I am concerned about your draft because, in leaving it solely up to the Legislature, you are not creating a strong office, but rather a weak one having no improvements over the present situation. You should also repeal the current section permitting a Public Prosecutor and regulating that officer's removal.

3. With modern communications, it is high time that we do not require an acting Governor whenever the Governor leaves island.

4. Supreme Court. This is an excellent proposal, and will solve many problems. However, I do have some suggestions. I do not think §(a)(3) will work. While it may good to provide for

some inherent powers, I think you have done it as much as can be done by providing that the Supreme Court is the highest court of Guam. Each state has its own history and doctrine as to what are its inherent powers. It really is not possible to apply the doctrine of 50 states to one jurisdiction. There are too many contradictions. There are too many different state constitutional provisions on the subject.

In the same way as my suggestions in for the other amendments, I suggest that you provide for the appointment and removal of the judges and justices. In the past, there have been amendments to such provisions to ensure that certain individuals are made judges, even where they were not qualified under the prior law. {Some have turned out to be good judges, but that does not mean we should pass laws for particular persons.)

Again, the Illinois Constitution can be instructive, but here the complex structure of the State judiciary makes copying not practical. However, as a replacement for item (3), I suggest the following:

> General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. The Supreme Court shall appoint an administrative director and staff to assist the Chief Justice in his duties. The administrative director shall

serve at the pleasure of the Court. Subject to the overall direction of the Supreme Court, the Legislature may provide for the staff structure and employment in the lower court(s) of Guam.

Assuming that you do not want to change the appointment and tenure of the justices and judges, I suggest the following changes to subsection (c):

(c) The qualification and duties of the justices and judges of the local courts of Guam, and the practice and procedure of these courts, shall be governed by the laws of Guam.

I have trouble in finding the reference to your amendment to 22C relative to appeals. Are the citations correct (or my sources incorrect)?

Thank you for the opportunity to express my observations on this proposal.

Sincerely yours,

CHARLES H. TROUTMAN

DEPARTMENT OF LAW
Office of the Attorney General

July 16, 1997

Hon. Robert A. Underwood, M.C.
170 Father Duenas Avenue, Suite 107
Agana, GU 96910

Dear Congressman Underwood,

Thank you for sending me the draft amendment to the Organic Act on the Attorney General. I do have a few comments.

First, if the position is to be appointed, I believe that the Organic Act should make it a true "constitutional position" by providing not only a method of removal (other than at the will of the Governor) but also provide for the basic functions of the position, as I mentioned in my earlier letter. The first, regarding removal, is required to overcome the judicial decisions that invalidated the former Public Prosecutor – that the Organic Act as written did not permit the Legislature to protect the office from removal for any reason if the Governor so desired. The Organic Act has been amended with respect to the "public prosecutor" to permit the Legislature to regulate the manner of removal of the officer. To make a meaningful amendment, such must be added here, or we will revert to pre-1984 law.

Second, if there is any substantive meaning to your amendment, the Attorney General needs to have some basic constitutional powers that are not subject to the Legislature's total will. Once before, the Legislature removed from the Attorney General the power to challenge unconstitutional

laws because it did not like one challenge he brought. That limitation was removed when the Public Prosecutor law was invalidated. I don not want to see that kind of skirmishing reinvented.

Therefore, I suggest the following changes to your proposal:

Beginning on line 22, page 2:

> "(A) appointed by the Governor, with the advice and consent of the legislature, for a term ending when a successor is appointed and qualified, and subject to removal only for causes stated in law; or"

Change item (d)(1)(A)(2) to (d)(1)(A)(3) on line 5 of page 3.

> "(2) set forth the duties and compensation of the Attorney General, who, in addition, shall be the chief legal officer of the Government of Guam having cognizance over all legal matters in which the government is in anywise interested."

The broad language comes from the existing law on the jurisdiction of the Attorney General, but haw been modified with reference to other agencies. I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having may and diverse legal "empires" within the government of Guam. This is the same idea as expressed in the 1970 Illinois Constitution.

Thank you for your consideration.

Sincerely yours,

CHARLES H. TROUTMAN
Compiler of Laws

DEPARTMENT OF LAW
Office of the Attorney General

September 2, 1997

Dear Congressman Underwood,

I am sorry for the delay, but I have been somewhat busier this month. I think Bill 354 by Senator Barrett-Anderson has several defects. First, it is inorganic for two reasons. I do not believe that the present Organic Act permits election even for a Public Prosecutor. The amendment permitted the establishment of the office of Public Prosecutor, and permitted the laws of Guam to regulate his/her removal. No mention is made of appointment. Therefore, I conclude that appointment of this Executive Branch officer still remains with the Governor as provided elsewhere in the Organic Act. Second, I believe it is inorganic to expand the idea of a Public Prosecutor to mean the entire legal representation of the Government of Guam. The legislative history will show that the Organic Act was amended in answer to the rejection of the Territorial Prosecutor by the courts. The US Supreme Court has never allowed such expansive readings of the Organic Act. See *People v. Olsen.*

For this reason, the Bill is premature. It is especially so when one considers the fact that the 9th Circuit refused to give retroactive effect to the School Board amendments found in the same Omnibus Bill as are these amendments.

The Bill is incomplete. It should address the reorganization of the Attorney General and the various problems now besetting the Office if the means of selection is to be changed this drastically. There a number of local problems, rightfully the subject of local legislation, that need

addressing. Such include the relationship between the Attorney General and counsel assigned or and/or hired by individual agencies, their funding, etc.

I don't particularly care if the Prosecution Division is separated from the Attorney General, but only if there is enough control remaining in the Attorney General so that he/she still retains general supervision over the legal affairs of the Government of Guam. Most, if not all, state attorneys general retain the power to file appeals or decline them, and to take over prosecutions in cases of conflict of interest or other good reasons. I believe the general attitude to divorce all the legal activities from "the Governor" is just plain bad policy.

Concerning your Bill, I would hope that you can amend it to provide that the Attorney General, no matter how he/she is selected, has the "constitutional" duty of being the chief legal officer for the Government of Guam and has some form of "constitutional" tenure of office. If elected, removal probably would be in lake manner to that of the Governor. If appointed, removal could be only for stated causes.

Thank you for your consideration.

Sincerely,

CHARLES H. TROUTMAN
Compiler of Laws

No. 04-1480

JUN 1 - 2005

In The
Supreme Court of the United States

DOUGLAS B. MOYLAN
Attorney General of Guam,

Petitioner,

v.

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY,
by and through its Board of Directors,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Guam

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID A. MAIR*
RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation
Attorneys at Law
238 A.F.C. Flores Street
Suite 801, Pacific News Building
Hagåtña, Guam 96910
Telephone: (671) 472-2089/2090

**Counsel of Record for Respondent*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Supreme Court of Guam erred in holding that the Organic Act's description of the Guam Attorney General as "Chief Legal Officer" does not preclude the Guam Legislature from allowing Guam government agencies, such as Respondent GIAA, to retain private counsel.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
ADDITIONAL RELEVANT STATUTORY PROVISION	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
REASONS FOR DENYING THE PETITION	8
I. THE LACK OF A DECISION FROM AN ARTICLE III COURT FURNISHES NO REASON FOR GRANTING *CERTIORARI*	9
A. Guam Courts are Competent to Address Federal Law	9
B. This Court is Reluctant to Review Territorial Decisions of Local Concern	10
C. This Case Does Not Involve Federal Jurisdictional Issues	12
D. The "Article III" Issue was Not Pressed or Passed Upon Below	13
II. THE SUPREME COURT OF GUAM'S OPINION DOES NOT DEVIATE FROM THIS COURT'S PRECEDENTS	14
III. THE SUPREME COURT OF GUAM'S OPINION DOES NOT CONFLICT WITH NINTH CIRCUIT RULINGS	15

TABLE OF CONTENTS – Continued

Page

IV. THE SUPREME COURT OF GUAM DID NOT ERR IN FINDING THAT THE ORGANIC ACT PERMITS THE GUAM LEGISLATURE TO LIMIT THE POWERS OF THE ATTORNEY GENERAL 18

A. The Powers of a Constitutionally-Elected Attorney General May be Limited by Legislatures 19

B. A Legislature May Permit Government Agencies to Retain Independent Counsel... 20

C. The Designation of the Attorney General as "Chief Legal Officer" Does Not Prohibit Guam's Legislature from Allowing Autonomous Agencies to Retain Independent Counsel 22

D. Guam Law has Not been Preempted by Federal Law 25

1. Federal preemption requires a "clear and manifest" intention of Congress..... 25

2. The express language of the Organic Act does not prohibit Guam's Legislature from allowing autonomous agencies to retain independent counsel..... 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Robertson, 520 U.S. 83 (1997) (*per curiam*)..... 13

Attorney General of Guam v. William R. Thompson (GIAA Exec. Mgr.), D. Guam Civ. Case No. 03-00008 (Order, April 1, 2003)..... 1, 6, 12

Board of Public Utility Commissioners of New Jersey v. Lehigh Valley, 149 A. 263 (N.J. 1930)..... 20

Bordallo v. Baldwin, 624 F.2d 932 (9th Cir. 1980) 16, 17

Chase Manhattan Bank (N.A.) v. South Acres Dev. Co., 434 U.S. 236 (1978)..... 14, 15

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)..... 25

City of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424 (2002)..... 26

English v. Gen. Elect. Co., 496 U.S. 72 (1990)..... 25

Fisher v. United States, 328 U.S. 463 (1946)..... 10

Gilbertson v. Albright, 381 F.3d 965 (9th Cir. 2004) (*en banc*)..... 10

Griffin v. United States, 336 U.S. 704 (1949)..... 10

Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002)..... 11

Gutierrez v. Ada, 528 U.S. 250 (2000)..... 15

Gutierrez v. Pangelinan, 276 F.3d 539 (9th Cir. 2002)..... 11

Hansen v. Utah State Retirement Board, 652 P.2d 1332 (Utah 1982)..... 20

Holland v. Watson, 14 So.2d 200 (Fla. 1943)..... 24

Howell v. Mississippi, ___ U.S. ___, 125 S. Ct. 856 (2005)..... 13

TABLE OF AUTHORITIES – Continued

Page

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961)..... 15

Johnson v. Commonwealth, et al., 165 S.W.2d 820 (Ky. 1942)..... 19

Maryland v. Louisiana, 451 U.S. 725 (1981)..... 25

Miller v. United States, 357 U.S. 301 (1958)..... 10

Moore v. Sims, 442 U.S. 415 (1979)..... 9

Nelson v. Ada, 878 F.2d 277 (9th Cir. 1989)..... 16, 17

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973)..... 26

Nguyen v. United States, 539 U.S. 69 (2003)..... 9

People v. Santa Clara Lumber Co., 110 N.Y.S. 280 (N.Y. 1908)..... 21

Pernell v. Southall Realty, 416 U.S. 363 (1974)..... 7, 10, 11

Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976)..... 18

In re: Request of Governor Camacho, rel. to the Interpretation and Application of Sections 6 and 9 of the Organic Act, 2004 Guam 10 at ¶ 38, 2004 WL 1293239..... 23

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)..... 25

Saint v. Allen, 134 So. 246 (La. 1931)..... 28, 29

Schwartz v. Texas, 344 U.S. 199 (1952)..... 26

Shute v. Frohmiller, 90 P.2d 998 (Ariz. 1939)..... 20

Silver v. New York Stock Exchange, 373 U.S. 341 (1963)..... 19

State Compensation Insurance Fund v. Riley, 69 P.2d 985 (Cal. 1937)..... 21

TABLE OF AUTHORITIES – Continued

Page

State of Florida ex rel. Shevin v. Yarborough, 257 So.2d 891 (Fla. 1972) 24

State of Missouri ex rel. McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857 (Mo. 1943) 19

State of North Dakota v. Erickson, 7 N.W.2d 865 (N.D. 1943) 19

State of Oklahoma v. Georgia-Pacific Corp., 663 P.2d 718 (Okla. 1982) 24

Territory of Guam v. Olsen, 431 U.S. 195 (1977) 12, 14

U.S. v. Borden Co., 308 U.S. 188 (1939) 18

Watson v. Caldwell, 27 So.2d 524 (Fla. 1946) 24

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 25, 26

Woodahl v. State Highway Commission, 465 P.2d 818 (Mont. 1970) 23, 24

STATUTES:

28 U.S.C. § 2201 6

48 U.S.C. § 1421(a) 16

48 U.S.C. § 1421g(a) 16

48 U.S.C. § 1421g(d)(1) 3

48 U.S.C. § 1421g(2) 27, 28

48 U.S.C. § 1422 ..... 22, 28

48 U.S.C. § 1423a 5, 16

2 G.A.R. § 2113 21

TABLE OF AUTHORITIES – Continued

Page

5 G.C.A. § 5121(b) 21

5 G.C.A. § 5150 21

5 G.C.A. § 30109 ..... 2, 17, 22

5 G.C.A. § 30109(c) 17, 21

12 G.C.A. § 1108(a) 21

12 G.C.A. § 1108(d) 21

RULES:

Sup. Ct. R. 10 ..... 8, 18

OTHER AUTHORITIES:

H.R. Rep. No. 105-742 (1998) 5

SINGER, SUTHERLAND STAT. CONSTR., § 23.21 (2002 ed.) 25

SINGER, SUTHERLAND STAT. CONSTR., § 23.22 (2002 ed.) 26

SINGER, SUTHERLAND STAT. CONSTR., § 5105 27

OPINIONS BELOW

Respondent adopts and incorporates Petitioner's statement in this regard, with the following addition concerning a closely-related case. One federal court has already faced the identical issues presented in this case and decided to abstain from ruling on them in deference to the Guam courts' rulings. In that case, *Attorney General of Guam v. William R. Thompson (GIAA Exec. Mgr.)*, D. Guam Civ. Case No. 03-00008 (Order, April 1, 2003),[1] the District Court of Guam held that the *Younger* and *Burford* abstention doctrines, as well as the Declaratory Judgment Act, counseled against federal court consideration of the identical issues raised in the case *sub judice*. In dismissing the federal suit, the district court stated, "[t]he federal court will not get embroiled in this 'intra-governmental dispute' between the Attorney General and the Executive Branch." Resp. App. p. 12. The Attorney General took an appeal from the order dismissing the case; and the matter was argued and submitted to the Ninth Circuit Court of Appeals on May 11, 2005. (*See* Docket Nos. 03-15823; 03-15999.) The appeal remains pending as of the date of this brief.

ADDITIONAL RELEVANT STATUTORY PROVISION

Respondent hereby adopts the Attorney General's recitation of "Relevant Statutory Provisions."[2] However, there was at least one notable omission from that recitation which Respondent would like to address. The Attorney General neglected to set forth the text of the provision

[1] The text of this unpublished disposition appears in the Appendix.

[2] *See* Pet. 2-7.

of Guam law which expressly sets forth the duties of the Attorney General. The applicable provision reads as follows:

> § 30109. Duties.
>
> The Attorney General is the public prosecutor and, by himself, a deputy or assistant, shall:
>
> (a) Conduct on behalf of the Government of Guam the prosecution of all offenses against the laws of Guam which are prosecuted in any of the courts of Guam, the District Court of Guam, and any appeals therefrom.
>
> (b) Draw all informations, conduct grand jury proceedings, prosecute all recognizances forfeited in the courts and all actions for the recovery of debts, fines, penalties and forfeitures accruing to the government of Guam, except as otherwise provided in this Act;
>
> (c) Conduct on behalf of the government of Guam all civil actions in which the government is an interested party; **provided that those branches, departments or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General.**
>
> (d) Deliver receipts of money or property received by him in his official capacity and file duplicates thereof with the Director of Administration;
>
> (e) As soon as practical after the receipt of any money in his official capacity, turn the money over to the Director of Revenue and Taxation, and on the first Monday of each month file with the Director of Administration, an account, verified by his oath, of all monies received by him

in his official capacity for the government of Guam during the preceding month;

(f) Be diligent in protecting the rights and properties of the government of Guam;

(g) Institute by any appropriate action proceedings on behalf of himself or any other public officer (not an employee) to have determined by the courts the validity of any law, rule or regulation of the government of Guam; and

(h) Perform such other duties as are required by law. [Emphasis added.]

STATEMENT OF THE CASE

This case below involved a straight-forward task of statutory construction. In 1998, Guam's Organic Act was amended to allow for the election of an Attorney General. 48 U.S.C. Section 1421g(d)(1). The language in this Amendment, so heavily relied upon by the Attorney General, says nothing about his "powers and duties." It merely states: "The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." There is nothing in this language or any other part of the Organic Act that "explicitly" prohibits the Guam Legislature from enacting legislation to permit autonomous government agencies to retain independent counsel.

The legislative history supports Respondent A.B. Won Pat Guam International Airport Authority's ("GIAA") contention that Guam's Legislature may decide whether to permit certain government agencies to retain independent counsel. On July 16, 1997, prior to the 1998 amendment, Guam's Compiler of Laws sent a letter to Guam's delegate in

Congress explaining that he did not see the proposed designation of the Guam Attorney General as "Chief Legal Officer" as eliminating the use of outside counsel for various agencies:

> I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having many and diverse legal 'empires' within the government of Guam.[3]

In another letter dated September 2, 1997, discussing the proposed amendment to the Organic Act at issue herein, Guam's Compiler of Laws explained to Guam's congressional delegate that it was "rightfully" a matter of "local legislation" whether to allow government agencies to retain independent counsel:

> There are a number of local problems, *rightfully the subject of local legislation,* that need addressing. Such include the relationship between the Attorney General and counsel assigned or and/or hired by individual agencies, their funding, etc.[4]

The letters of July 16, 1997, and September 2, 1997, are the only two references in the legislative history to the 1998 Amendment that make any reference to the ability of government agencies to retain independent counsel. One of these letters plainly states that the proposed amendments to the Organic Act do not eliminate "the use of outside counsel for various agencies." The other letter is equally clear in declaring the "relationship" between the

---

[3] Appellant's Excerpts of Record (Sup. Ct. of Guam 6/14/04), at p. 36.

[4] Appellant's Excerpts of Record (Sup. Ct. of Guam 6/14/04), at p. 38.

Attorney General and independent counsel a rightful "subject of local legislation."

In fact, rather than restricting the powers of Guam's Legislature, the 1998 amendment to the Organic Act expanded those powers. H.R. Rep. No. 105-742 (1998) explicitly acknowledges that the same bill which created the position of the elected Attorney General also contained a provision amending the Organic Act so as to broaden the extent of the Legislature's powers:

> H.R. 2370 would amend the Organic Act of Guam to allow its legislature to enact a law providing for the election of the island's attorney general, specify that simple majority of legislators qualifies as quorum, and *broaden the extent of the legislature's powers.*[5]

To this end, the same law that amended the Organic Act to permit for an elected Attorney General also amended the Organic Act to clarify that the legislative power of Guam's Legislature shall extend to all "rightful subjects of legislation not inconsistent with the provisions of this Act and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a, *as amended by* GUAM PUB. L. 105-291:4. By undeniably granting the Guam Legislature power to legislate "all rightful subjects of legislation," it is clear that Congress intentionally declined to have the Organic Act define the powers of the Attorney General of Guam, and that it instead decided to leave that duty to the Legislature, pursuant to its expansive powers as set forth in 48 U.S.C. § 1423a.

---

[5] Appellee's SER (Sup. Ct. of Guam 7/14/04), at 1, p. 5 (emphasis added).

While the Attorney General's description of the course of the proceedings below in his "Statement of the Case" (Pet. 7-10) was generally accurate, it was incomplete[6] and it mischaracterized portions of the relevant court decisions.

The Guam Supreme Court summarized its holding as follows: "We hold that the Attorney General, as Chief Legal Officer, is charged with all the powers and duties pertaining to the office at common law, except insofar as they have been expressly restricted or modified by statute." Pet. App. A-37, ¶ 67. (The Attorney General erroneously used the word "amended" instead of the word "modified" when quoting from the Guam Supreme Court's Opinion. *See* Pet. 10.) The Guam Supreme Court then held that local statutes allowing GIAA to retain independent counsel were "valid exercises of the Guam Legislature's constitutional powers granted by the Organic Act." *Id.*

The Attorney General also mischaracterized the holding of the District Court of Guam in dismissing the Attorney General's Complaint in the closely-related federal case entitled, *Attorney General of Guam v. William R. Thompson*, D. Guam Civ. Case No. CV03-00008, (Order, April 1, 2003) (unpublished). While it is true, as the Attorney General states, that the Complaint was dismissed on *Younger* and *Burford* abstention grounds, the district court also declined to entertain the matter on the "separate and distinct" ground of the Declaratory Judgment Act, 28 U.S.C. § 2201. Resp. App. 4 ("the Declaratory Judgment

---

[6] The Attorney General applied for a stay from the Guam Supreme Court pending disposition of his Petition, but the application for stay was denied on March 2, 2005. Thereafter, this Court, per order of Justice O'Connor, denied a similar application for Stay on March 21, 2005. (Application 04A812.)

Act was not meant for these kinds of actions. Accordingly, the Court grants the motion to dismiss.").

SUMMARY OF ARGUMENT

The case below involved nothing more than a routine question of statutory construction of the kind state and territorial courts address every day. Contrary to the Attorney General's assertion, the courts of Guam did not "exalt[ ] local law over a Congressional enactment."[7] In fact, the Guam courts simply *interpreted* Congressional intent, and thereby reached a result in the case with which the Attorney General is disenchanted. This Court has demonstrated a long-standing "reluctance to review" decisions of territorial courts interpreting federal statutes of peculiarly local concern. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974). Needless to say, the Attorney General's disenchantment provides no justification to abandon this historic reluctance.

On the merits, the critical flaw in the Attorney General's argument is that the vague and undefined term "Chief Legal Officer" as used in the Organic Act does not, on its face, preclude the Guam Legislature from doing anything in particular. Moreover, as we shall see, judicial interpretations of those words from courts around the country confirm that such a designation, even when entrenched in a state constitution, does not preclude state legislatures from authorizing state agencies to employ private counsel. The Guam Supreme Court's disposition was well-reasoned and consistent with the legislative

[7] *See* Pet. 12.

history of the Organic Act as well as similar judicial interpretations on point. It should not be disturbed.

REASONS FOR DENYING THE PETITION

"[A] petition for writ of *certiorari* will be granted only for compelling reasons." Sup. Ct. R. 10. This case is really just an insular squabble between branches of a Territorial government. The Attorney General has failed to come forward with any compelling reason why this Court should grant *certiorari* to address such a squabble, which the Guam courts are fully competent to examine and which has no impact beyond the shores of Guam.

This case does not meet any of the standards for *certiorari*. The Guam Supreme Court's ruling below was consistent with the overwhelming weight of authority from state courts around the country that have addressed similar issues. The Court's Opinion made no new law; it merely made a routine application of these precedents and precedents from this Court. There is no split between the Circuit courts on any important issue of law. Contrary to the Attorney General's assertions, the Guam Supreme Court did not decide an important federal question in a way that conflicts with the decision of another state court or a federal court of appeals. Indeed, the federal statute at issue is uniquely applicable to the Territory of Guam and nowhere else. This Court has demonstrated a long-standing "reluctance to review" decisions of territorial courts interpreting federal statutes of peculiarly local concern. While the Organic Act is a federal statute, it is notable that the Court below also interpreted several unique Guam statutes in rendering its Opinion. Finally,

there is not even a dispute over the meaning of any of this Court's precedents. The Attorney General failed to explain, in light of this Court's standards for granting *certiorari*, why this Court should undertake to review the interpretations given Guam statutes by Guam's highest court.

With this backdrop, GIAA now addresses the four particular "reasons" advanced by the Attorney General which supposedly justify granting its Petition.

I.

THE LACK OF A DECISION FROM AN ARTICLE III COURT FURNISHES NO REASON FOR GRANTING *CERTIORARI*

The Attorney General's first purported reason for granting the petition is, frankly, difficult to fathom. Apparently, the Attorney General is maintaining that this Court should grant *certiorari* simply because the controversy *sub judice* might otherwise escape review of an Article III court. For multiple reasons, this argument is decidedly unpersuasive.

A. Guam Courts are Competent to Address Federal Law

While this Court has held that non-Article III judges may not preside on Circuit court appellate panels, *see Nguyen v. United States*, 539 U.S. 69 (2003), it has neither held nor even suggested that state or territorial judges are prohibited from rendering interpretations of federal statutes. In fact, it is settled law that state and territorial courts are to be *presumed* competent to interpret federal law. *See Moore v. Sims*, 442 U.S. 415, 430 (1979) (noting

that the court has "repeatedly and emphatically rejected" the notion that state courts were not competent to adjudicate federal constitutional claims); *see also Gilbertson v. Albright*, 381 F.3d 965, 983 (9th Cir. 2004) (*en banc*).

B. This Court is Reluctant to Review Territorial Decisions of Local Concern

Not only are non-Article III courts *competent* to pass on federal statutory matters, this Court has demonstrated a long-standing "reluctance to review" decisions of such courts interpreting federal statutes of peculiarly local, territorial concern. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974). In *Pernell*, this court faced the question of whether there was the right to trial by jury in an action brought in the District of Columbia for the recovery of possession of real property. In addressing the issue, the Court made several observations highly relevant to the instant controversy. In particular, the Court said, "[t]his Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." 416 U.S. at 366-368, *citing, Griffin v. United States*, 336 U.S. 704, 717-718 (1949); *Fisher v. United States,* 328 U.S. 463, 476 (1946); and *Miller v. United States,* 357 U.S. 301, 306 (1958).

In fact, the *Pernell* opinion effectively makes short work out of the Attorney General's Article III arguments by establishing that while this Court certainly has the power to revisit the rulings of territorial high courts, there are sound reasons why it generally declines to do so:

> Congressional Acts directed toward the District, like other federal laws, admittedly come within this Court's Art. III jurisdiction, and we are therefore not barred from reviewing the interpretations of those Acts by the District of Columbia Court of Appeals in the same jurisdictional sense that we are barred from reconsidering a state court's interpretation of a state statute. *See, e.g., O'Brien v. Skinner,* 414 U.S. 524, 531 (1974); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 256 (1974). But the new court structure certainly lends additional support to our **long-standing practice of not overruling the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed.'** *Fisher v. United States,* 328 U.S. at 476; *Griffin v. United States,* 336 U.S. at 718.

Id. at 368-369 (emphasis added).

The deference applied in *Pernell* plainly applies to the instant case because the District of Columbia's post-1970 court structure closely resembles that of Guam. Both jurisdictions now have local courts of last resort which are akin to state supreme courts. *See, e.g., id.* at 367. It is notable that the Ninth Circuit Court of Appeals has given similar deference to Guam Supreme Court rulings "on matters of local concern." *See Guam v. Guerrero,* 290 F.3d 1210, 1213-1214 (9th Cir. 2002); *Gutierrez v. Pangelinan,* 276 F.3d 539, 547 (9th Cir. 2002) ("The Congressional promise of independent institutions of government would be an empty one if we did not recognize the importance of the Guam Supreme Court's role in shaping the interpretation and application of the Organic Act.").

Unquestionably, the instant case presents a problem peculiarly (if not exclusively) of local concern; and one without "nationwide application." Moreover, nothing in the Attorney General's Petition even remotely suggests that the instant case presents an "exceptional situation[] where egregious error has been committed" by the Guam courts. Thus, it is respectfully submitted that this court should deny the instant petition on that ground alone.

Moreover, it is elementary that many if not most cases originating in the courts of Guam which raise issues of federal law routinely evade review by an Article III court. If the absence of such Article III court review alone furnished adequate ground for *certiorari*, then this Court would likely have a docket full of cases originating in the courts of Guam and other U.S. territories and possessions where no Article III court sits.[8]

C. This Case Does Not Involve Federal Jurisdictional Issues

The Attorney General suggests that the instant case is somehow akin to *Territory of Guam v. Olsen*, 431 U.S. 195 (1977), in which this Court held that the Guam Legislature was not authorized to divest the local federal court, the District Court of Guam, of appellate jurisdiction in

---

[8] Even if the Attorney General's Article III argument were otherwise colorable, it would not support his contention that *certiorari* should be granted in the instant case. As the Attorney General has conceded, his first attempt to have this controversy heard in federal court was rejected by dismissal of the case *Attorney General of Guam v. Thompson*, District Court of Guam Civil Case No. CV03-00008. The Attorney General's appeal of that dismissal was recently heard by the Ninth Circuit, which is indisputably an Article III court.

cases turning on questions of federal law. However, the instant case implicates no such attempt to deprive the District Court of any jurisdiction. This is simply an intragovernmental dispute concerning the right of a Government of Guam agency to hire private counsel, a matter of local concern of no impact on the federal judiciary.

D. The "Article III" Issue was Not Pressed or Passed Upon Below

Finally, the supposed issue of evading Article III review is not properly before the Court because it was not pressed or passed upon in the Courts below, but is being raised now for the first time. Earlier this term, the Court observed that, " . . . this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, ___ U.S. ___, 125 S. Ct. 856, 858 (2005), *quoting Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*). *Certiorari* should not be granted where the state supreme court did not expressly address the question for which *certiorari* is sought and the petitioner does not meet its burden of showing that the issue was properly presented to that court. *See Adams*, 520 U.S. at 86. The Attorney General simply never argued any Article III issue until now and the Guam courts had no occasion to analyze it.

II.

THE SUPREME COURT OF GUAM'S OPINION DOES NOT DEVIATE FROM THIS COURT'S PRECEDENTS

The Attorney General maintains that the Guam Supreme Court's holding in the case below is somehow in conflict with this Court's jurisprudence interpreting Guam's Organic Act. Yet the Attorney General never quite gets around to pointing out any particular holding of the case below that is directly contrary to any of this Court's pronouncements. Instead, he merely argues that the Guam Supreme Court's *reasoning* was different than that employed by this Court in analogous cases. That is not surprising, because the statutes and issues involved in the instant case are entirely distinct from those addressed by this Court in those earlier cases.

First, the Guam Supreme Court did not make any rulings contrary to the *Olsen* case because, as discussed above, the issues in the instant case have no similarity to those presented in *Olsen*. This case does not involve any attempt by the Guam Legislature to deprive the District Court of jurisdiction; and it involves entirely different Congressional and Legislative enactments than those addressed in *Olsen*. Nothing in *Olsen* even remotely addresses the issue of whether the Guam Legislature can permit Guam agencies to retain private counsel despite the Attorney General's "Chief Legal Officer" designation.

Likewise, *Chase Manhattan Bank (N.A.) v. South Acres Dev. Co.*, 434 U.S. 236 (1978) (*per curiam*), was concerned with the scope of federal jurisdiction granted to the District Court of Guam under the Organic Act. Yet

South Acres is even further afield of the current controversy because the case did not in any manner involve any alleged conflict between local and federal enactments. *South Acres* merely stands for the proposition that "[w]here . . . Congress has clearly established appropriate limitation on the District Court's original jurisdiction, [courts] are compelled to respect those limits." *Id.* at 240 (holding that the Organic Act did not vest the District Court of Guam with diversity jurisdiction). By contrast, the mere designation of the Attorney General as "Chief Legal Officer" does not "clearly establish[ ]" anything.

Finally, *Gutierrez v. Ada*, 528 U.S. 250 (2000), is similarly wide of the mark. *Gutierrez* involved no allegedly-conflicting local enactments but merely interpreted the term "votes cast" as used in an Organic Act provision pertaining to elections for Governor. *Id.* at 255. Ironically, to the extent *Gutierrez* has any relevance whatsoever to the present dispute, it aids GIAA, not the Attorney General. The *Gutierrez* court's discussion about avoiding "the giving of unintended breadth to Acts of Congress" (*Id.*[9]) certainly has salience with respect to Congress' use of the unadorned phrase "Chief Legal Officer."

III.

THE SUPREME COURT OF GUAM'S OPINION DOES NOT CONFLICT WITH NINTH CIRCUIT RULINGS

The Attorney General also maintains that the Guam Supreme Court's disposition conflicts with relevant Ninth

---

[9] *Quoting Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961), with reference to the venerable doctrine of *noscitur a sociis*.

Circuit authority on point. In particular, the Attorney General discusses the cases of *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir. 1980), and *Nelson v. Ada*, 878 F.2d 277 (9th Cir. 1989); but again, the Attorney General fails to identify any particular holding of the case below that is irreconcilable with prior case law. Indeed, these two Ninth Circuit cases are plainly and fundamentally distinguishable from the scenario presented in the case at bar.

In the *Bordallo* case, the issue was whether the Governor or the Legislature had the authority to appoint members to the Guam Memorial Hospital governing body. The Ninth Circuit held that the Governor had that authority because the Organic Act *specifically* vested his office with such authority and that the Legislature therefore could not, by subsequent legislation, divest the Governor of such power. Significantly, the *Bordallo* court observed that the Organic Act vested the Governor with "general supervision and control of all the departments, bureaus, agencies and other instrumentalities of the executive branch of the government of Guam." *Id.* at 934, *citing* 48 U.S.C. § 1423a. The court then noted that such supervisory authority specifically included "the power to appoint and remove officers and employees of the executive branch." *Id.* Finally, the Court observed that the Governor was "specifically charged" by Section 1421g(a) of the Organic Act with the responsibility for establishing, maintaining and operating hospitals. *Id.*

Similarly, in *Nelson*, the Ninth Circuit expressly relied upon its earlier ruling in *Bordallo* in holding that where the Organic Act specifically charged the Governor with the responsibility for establishing and maintaining the public education system school board members had to be appointed by the Governor. 878 F.2d at 278-279. As in

Bordallo, the *Nelson* court found that the Legislature could not contravene specific Organic Act provisions indicating that the Governor was empowered to make such appointments. *Id.* at 279.

In contrast to these two cases, no such similar "specific," empowering Organic Act language applies to the instant controversy. The Organic Act provision describing the Attorney General's powers is comparatively vague and distinctly *un*specific in this regard: It states only that the Attorney General is the "Chief Legal Officer" of the Government. Indeed, while the Governor's duties are set forth in the Organic Act, the Attorney General's duties are found not in the Organic Act but in a provision of *local* law, namely 5 G.C.A. § 30109, which provides that the Attorney General shall "[c]onduct on behalf of the government of Guam all civil actions in which the government is an interested party; **provided that those branches, departments or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General.**" 5 G.C.A. § 30109(c) (emphasis added).

The Opinion in the case below does not in any manner conflict with these two Ninth Circuit cases because while the Organic Act grants the Governor of Guam specific powers that cannot be infringed upon, the Attorney General was granted no such specific powers. He is merely the "Chief Legal Officer" of the Government of Guam. As we shall see in the following section of this brief, courts around the country that have interpreted that phrase have concluded that it is not inconsistent with allowing agencies the right to retain private counsel.

IV.

THE SUPREME COURT OF GUAM DID NOT ERR IN FINDING THAT THE ORGANIC ACT PERMITS THE GUAM LEGISLATURE TO LIMIT THE POWERS OF THE ATTORNEY GENERAL

As the Rules of this Court make plain, "[a] petition for writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a correctly-stated rule of law." Sup. Ct. R. 10. Nowhere in his Petition does the Attorney General maintain that the Guam Supreme Court misstated the applicable law. Instead, he merely argues that the court *misapplied* the law and reached the wrong conclusion. Thus, the Attorney General's extended argument to the effect that Guam Supreme Court misapplied familiar rules of statutory construction does little to advance his Petition. Nevertheless, GIAA now undertakes to respond to the Attorney General's argument.

The Guam Legislature has expressly invested in certain autonomous government agencies, such as GIAA, the power to sue and be sued and to retain independent counsel. This arrangement is prevalent in the United States and has been an historical practice in Guam for decades. The Attorney General now argues that the 1998 amendment to Guam's Organic Act has stripped the Guam Legislature of its power to authorize autonomous government agencies to retain independent counsel. The 1998 amendment, however, did not expressly deprive Guam's Legislature of this right. Moreover, it is a "cardinal principle" of construction that repeals by implication are not favored. *U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154-155 (1976) ("It is not enough to show that the two statutes

produce differing results . . . '[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and then only to the minimum extent necessary.'"); *quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

In fact, as discussed above, prior to the enactment of this legislation, Congress was advised in writing by the Guam Compiler of Laws that the proposed amendment "did not" eliminate "the use of outside counsel for various agencies . . . " *See* p. 4, *supra*. Moreover, state courts have repeatedly held that legislatures may permit government agencies to retain independent counsel, notwithstanding the constitutional designation of an elected Attorney General as a "Chief Legal Officer."

A. The Powers of a Constitutionally-Elected Attorney General May be Limited by Legislatures.

Courts throughout the United States have consistently held that the powers of constitutionally-elected Attorneys General may be limited by legislative enactment. *Johnson v. Commonwealth, et al.*, 165 S.W. 2d 820, 826 (Ky. 1942) ("The Legislature may not only add duties but may lessen or limit common law duties."); *see also State of Missouri ex rel. McKittrick v. Missouri Public Service Commission*, 175 S.W. 2d 857, 861 (Mo. 1943) ("On the first question, there can be no doubt that the Constitution does not prohibit the General Assembly from limiting the common law powers of the Attorney General."); and *State of North Dakota v. Erickson*, 7 N.W.2d 865, 868 (N.D. 1943) ("The attorney general is a constitutional officer only in so far as the establishment of the office is concerned . . . Authority that the legislature may at one time prescribe, it

may later take away and vest elsewhere. I have no doubt that the legislature by express restriction may curtail powers normally exercised by the attorney general by vesting such powers as it may see fit in other officials or such attorneys as it may specifically authorize to act.").

The fact that an Attorney General's position is authorized by a state constitution does not prohibit a legislature from prescribing his duties. *Shute v. Frohmiller*, 90 P. 2d 998, 1003 (Ariz. 1939) ("[We] are clearly of the view that the mere naming of the attorney general in the constitution of this state does not amount to an implied restriction on the authority of the legislature in prescribing his duties."), *overruled on other grounds* by *Hudson v. Kelly*, 263 P.2d 362, 366-67 (Ariz. 1953) (legislature has "implied mandate" to grant Attorney General powers and duties to perform functions of office).

B. A Legislature May Permit Government Agencies to Retain Independent Counsel.

In *Hansen v. Utah State Retirement Board*, 652 P. 2d 1332 (Utah 1982), the Utah Attorney General argued that he was constitutionally authorized to act as "legal adviser" to "state officers," and, as a consequence, state governmental agencies (such as the Utah State Retirement Board, Utah State Insurance Fund and the University of Utah) were prohibited from retaining independent counsel. The Utah Supreme Court was unpersuaded: "As to each defendant, the Legislature has conferred specific statutory authority authorizing the employment of independent counsel . . . Thus, the authority for each defendant to hire independent counsel has a clear statutory foundation." *Id.* at 1340. *See also, Board of Public Utility Commissioners of*

New Jersey v. Lehigh Valley, 149 A. 263, 264 (N.J. 1930) (powers and privileges of the Attorney General as they existed at common law, and particularly as conferred by statute, are subject to change and modification by legislative enactment); *People v. Santa Clara Lumber Co.*, 110 N.Y.S. 280, 281 (N.Y. 1908) ("The Attorney General is a constitutional officer, but his principal duties are from time to time defined by statute. We cannot agree with him that he alone is authorized to represent the state as attorney in bringing actions in the name of the people of the state."); *State Compensation Insurance Fund v. Riley*, 69 P.2d 985, 987 (Cal. 1937) ("[t]he law is well settled that a public agency may employ special counsel to protect its rights, unless specifically prohibited from so doing by statutory or charter provision. . . . ")

Guam's Legislature, like the legislatures of most states, has expressly empowered certain government agencies, such as GIAA, to retain independent counsel. *See* 12 G.C.A. §§ 1108(a), (d).[10] Under Guam law, "those branches, department or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General." 5 G.C.A. § 30109(c) (emphasis added).

---

[10] By statute, the Attorney General of Guam must approve any contract for legal services. 5 G.C.A. § 5121(b). However, the Attorney General is only permitted to participate in the negotiations for such a contract "upon the request of the government officer or agency primarily responsible for such negotiations." 5 G.C.A. § 5121(b). Furthermore, the right of the Attorney General to review professional services agreements is limited to an inquiry as to "correctness of their form" and "legality" in order to confirm that the "required procedures" were followed to award the contract. 2 G.A.R. § 2113; 5 G.C.A. § 5150.

Bolstering this plain language is the Comment of the Compiler of Laws in the Guam Code Annotated which observes: "Subsection (c) has been amended by P.L. 18-04:5, to conform to the laws which give to specific agencies the authority to hire their own lawyers, who may undertake litigation without the supervision of the Attorney General. Such agencies include ... the Airport Authority ..." *See* 5 G.C.A. § 30109, *Comment.*

C. The Designation of the Attorney General as "Chief Legal Officer" Does Not Prohibit Guam's Legislature from Allowing Autonomous Agencies to Retain Independent Counsel.

A thread woven throughout the Attorney General's Petition is the argument that Congress considered but rejected a proposal to make the Attorney General's powers subject to the clause "as may be prescribed under the laws of Guam."[11] However, this argument about what *might have been* stated in the Organic Act lends the Attorney General little aid. In fact, the argument cuts both ways. For while it is true that Congress did not adopt the suggested language in connection with the phrase "Chief Legal Officer," it is equally true that Congress failed to adopt specific and expansive language, which Congress applied to the office of Governor, that would have vested the Attorney General with "general [legal] control and supervision of all the departments, bureaus, agencies and other instrumentalities of the executive branch of the Government of Guam." *See* 48 U.S.C. § 1422. If Congress

[11] The Attorney General points to the Organic Act provisions setting forth the duties of the office of the Lieutenant Governor and notes that Congress "expressly authorize[d] the local legislature to prescribe [his] powers and duties." Pet. 15.

had adopted such language with respect to the office of the Attorney General, then the Guam Supreme Court would surely have agreed with him that his office had the power to preclude or control private counsel. *See, e.g., In re: Request of Governor Camacho, rel. to the Interpretation and Application of Sections 6 and 9 of the Organic Act*, 2004 Guam 10 at ¶ 38, 2004 WL 1293239 ("We thus conclude that the Governor's power of 'general supervision and control of all departments, bureaus, agencies and other instrumentalities of the executive branch of the government of Guam,' means that the Governor is vested with the overall power to manage, direct, or oversee such entities."). However, Congress did *not* adopt such language with respect to the Attorney General. To paraphrase the Attorney General's Petition, "Congress knew full well" how to invest expansive supervisory powers in Organic Act officers. *See* Pet. 29. Yet Congress declined to do so in the case of the Attorney General's office.

Instead of using the specific and expansive language applicable to the office of Governor, Congress was content with the unadorned phrase, "Chief Legal Officer of the Government." The courts of the various states have made it plain that these simple words are not to be given the sweeping application the Attorney General claims. For example, in *Woodahl v. State Highway Commission*, 465 P. 2d 818 (Mont. 1970), the Attorney General of Montana argued that he was the "chief legal officer" of his state, and that the State Highway Commission should not be permitted to retain independent counsel. The Montana Supreme Court rejected that notion and resolved the dispute as follows:

> However, he [the Attorney General] is not omnipotent, or as one brief put it, does not have

> "dictatorial power." However broad the power of the Attorney General, it is not exclusive. That is to say, the question of whether he can hire, fire, and direct all legal representation of state officers or agencies, especially of the highway commission, depends here, upon whether the legislature has authorized the highway commission to do as it has done.

Id. at 820.

In *State of Oklahoma v. Georgia-Pacific Corp.*, 663 P.2d 718, 722-723 (Okla. 1982), the Attorney General of Oklahoma argued that because he was elected and designated "Chief Law Officer," he had the common law authority to file actions without the approval of the Governor or the Legislature notwithstanding a statute requiring that he get approval before doing so. The Supreme Court of Oklahoma disagreed and ruled: "We fail to see that the legislative investiture of the mantle of 'Chief Law Officer' alone conferred upon the office a stature which it did not already have. . . . "

Like Guam, Florida's Attorney General is the "chief state legal officer." *State of Florida ex rel. Shevin v. Yarborough*, 257 So.2d 891, 893 (Fla. 1972). Despite this fact, Florida's Supreme Court has repeatedly allowed state agencies to retain private counsel when they had legislative authority to do so. *Watson v. Caldwell*, 27 So.2d 524 (Fla. 1946); *Holland v. Watson*, 14 So.2d 200 (Fla. 1943).

D. Guam Law has Not been Preempted by Federal Law.

1. Federal preemption requires a "clear and manifest" intention of Congress.

Although he no longer speaks in terms of "preemption," the crux of the Attorney General's argument is that the 1998 amendment to the Organic Act effectively preempted any local statutes in Guam allowing autonomous agencies to be represented by independent counsel. In passing on questions of preemption, this Court starts with the assumption that the powers of the states are not to be superseded by federal law "unless that was the clear and manifest purpose of Congress." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) ("when considering preemption, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also*, *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

This Court has held that federal law preempts local law only in three limited situations: (1) where Congress "explicitly" defines the extent to which it is preempting state law; (2) where, absent "explicit statutory language," the federal scheme is so pervasive as to leave "no room for the States to supplement it;" and (3) where there is such an actual conflict that it is impossible to comply with both federal and state requirements. *See*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *English v. Gen. Elect. Co.*, 496 U.S. 72, 78-79 (1990); *see also*, SINGER, SUTHERLAND STAT. CONSTR., § 23.21 (2002 ed.) (conflict must be irreconcilable).

Federal preemption is not automatic just because Congress enacts legislation in a field of law. *See New York State Department of Social Services v. Dublino*, 413 U.S. 405, 422 (1973) (recognizing the validity of a New York law conditioning an individual's receipt of federal Aid to Families with Dependant Children assistance upon fulfillment of additional state requirements). Indeed, this Court's jurisprudence recognizes a presumption favoring the legitimacy of state legislation as opposed to federal preemption. *Id.* The Court has stated: "If Congress is authorized to act in a field, it should manifest its intention clearly . . . The exercise of federal supremacy is not lightly to be presumed." *Id.* at 413 (*quoting Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)).

Accordingly, the Court presumes that Congress does *not* intend to preempt state legislation unless there is a clear indication from the language or purposes of the federal statute or regulation. *Id.* "Mere silence," the Court has held, "cannot suffice to establish a clear and manifest purpose to pre-empt local authority." *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 440 (2002) (*quoting Mortier*, 501 U.S. at 607). Moreover, if joint compliance is possible and the state and federal purposes are similar or identical, the state action is deemed supplementary to the federal purposes and the regulation must be sustained. *See generally Mortier*, 501 U.S. at 607 (federal law implies regulatory partnership between federal, state and local governments); *see also*, SINGER, SUTHERLAND STAT. CONSTR., § 23.22 (2002 ed.).

2. The express language of the Organic Act does not prohibit Guam's Legislature from allowing autonomous agencies to retain independent counsel.

Inasmuch as the Organic Act is silent on the subject of independent counsel representing government agencies, it cannot plausibly be argued that the federal scheme is so pervasive in the area as to leave "no room for the states to supplement it." Additionally, there is no actual conflict between the Organic Act and Guam law such that it is impossible to comply with both federal and state requirements. The fact that Guam has specific legislation authorizing GIAA to retain independent counsel is an important consideration when resolving any issue of statutory construction. *See* SINGER, SUTHERLAND STAT. CONSTR., § 5105 at 244-257 ("Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.")

Indeed, there is nothing at all in the plain language of the 1998 Amendments to the Organic Act that suggests that the powers of the Guam Legislature were being curtailed in relation to an elected Attorney General.[12] The

[12] If anything, Guam's Legislature undoubtedly has more power over Guam's elected Attorney General than other state legislatures have over their own elected Attorneys General. Unlike many states, the existence of an elected Attorney General in Guam is not a matter of constitutional right. Congress expressly provided by legislative enactment that the Guam Legislature could decide whether Guam should or should not have an elected Attorney General. 48 U.S.C.

(Continued on following page)

mere identification of the Attorney General as the "Chief Legal Officer of the Government of Guam" does not mean that his powers extend to distinct and independent government agencies. Indeed, as observed above, if Congress had intended the Attorney General to have plenary control over legal affairs of all government agencies it could easily have advanced such an intention by cloning the Organic Act language describing the duties of the Governor. *See* 48 U.S.C. § 1422 (vesting Governor with "general control and supervision of all the departments, bureaus, agencies and other instrumentalities of the executive branch of the Government of Guam."). Congress, however, did not do so.

Moreover, even judicial authorities interpreting more specific language have expressly held that the Attorney General's powers do not extend to distinct agencies of the government. For example, in *Saint v. Allen*, 134 So. 246 (La. 1931), the Attorney General of Louisiana argued, much as Guam's Attorney General now maintains, that any statute authorizing the retention of independent counsel was in conflict with the state Constitution.[13] The Supreme Court of Louisiana in *Saint* rejected such a view, holding that the Constitution only authorized the Attorney

---

§ 1421g(2), as amended by Public Law 105-291 Section 2. In addition, Congress has allowed Guam's Legislature to decide upon the "procedures" by which Guam's elected Attorney General could be removed "for cause." *Id.* It is difficult to imagine any state legislature in the United States having greater powers over an elected Attorney General.

[13] The Louisiana constitutional provision at issue was far more specific and empowering than the term "Chief Legal Officer." It provided, *inter alia*, that the Attorney General "shall attend to, and have charge of all legal matters in which the State has an interest, or to which the State is a party, with power and authority to institute and prosecute or to intervene in any and all suits or other proceedings . . ." *Id.*, 134 So. at 247.

General to represent the "State;" and that the Highway Commission was a distinct "agency of the State," with the power to sue or be sued, and "not the State itself." *Id.* at 249. For this reason, the Court found that the "duties and powers of the Attorney General and his assistants do not, by virtue of the Constitution, save as some of those duties may be prescribed by statute, attach to the commission." *Id.*

Based upon the foregoing analysis and authorities, it is clear beyond peradventure that the Guam Supreme Court's disposition is sound and in harmony with the great weight of authority on point. The court below neither misstated nor misapplied the law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petitioner's petition should be denied.

Dated this 1st day of June, 2005.

Respectfully submitted,

DAVID A. MAIR*
RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation

**Counsel of Record for Respondent*

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

THE ATTORNEY GENERAL OF GUAM, Plaintiff, vs. WILLIAM R. THOMPSON, in his official capacity as Executive Manager of the Guam Airport Authority, Defendant.	Civil Case No. 03-00008 ORDER (Filed Apr. 1, 2003)

This case came before the Court on March 26, 2003 for hearing on three motions filed by the defendant. The defendant sought dismissal of the case on three grounds: (1) plaintiff's failure to name the proper defendant and join an indispensable party; (2) lack of subject matter jurisdiction; and (3) unsuitability of declaratory relief. Assistant Attorney General J. Basil O'Mallan appeared on behalf of the plaintiff, the Attorney General of Guam. Appearing on behalf of the defendant William R. Thompson ("Mr. Thompson") was Attorney David Mair. At the conclusion of the hearing, the Court ruled on the pending motions. The Court now issues this written Order memorializing its oral ruling.

FACTS and PROCEDURAL HISTORY

The facts are basically undisputed. Mr. Thompson is the Executive Manager of the Guam International Airport Authority ("GIAA"). On March 3, 2003, the plaintiff

brought suit in this Court against the defendant. Pursuant to the federal Declaratory Judgement Act, 28 U.S.C. § 2201,[1] the plaintiff prayed that the Court would "[e]nter a declaratory judgment ... wherein the rights of the parties ... are determined, and specifically, [p]laintiff prays that this Court enter a Judgment providing that the designation of Chief Legal Officer in 48 U.S.C. § 1421g(d)[2] pre-empts any laws of Guam respecting the distribution of power and responsibilities between the Attorney General of Guam and private counsel representing government agencies and department." *Complaint* at 4, ¶1. The plaintiff also sought temporary and permanent injunctions enjoining the defendant "and those in active concert or participation with him ... from entering into a contract with an attorney to provide legal services for [GIAA] that is berett [sic] of provisions for supervision by the [p]laintiff of any litigation conducted by such attorney on behalf of [GIAA]." *Complaint* at 4, ¶3.

On March 5, 2003, the plaintiff moved for the issuance of a preliminary injunction.

---

[1] This statute in pertinent part provides:

> "In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, **may** declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201 (emphasis added).

[2] The pertinent provision of the Organic Act of Guam states: "[t]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1).

On March 7, 2003, GIAA filed a Petition for Writ of Mandamus in the Superior Court of Guam.[3] The Superior Court action involves identical issues to those raised in this case. In the Superior Court action, the parties seek judicial interpretation of local law as well as the Organic Act in order to resolve the dispute over authority to retain and be represented by private counsel. Presiding Judge Alberto C. Lamorena, III issued an Alternative Writ of Mandate ("Writ") in the Superior Court action directing the Attorney General to allow GIAA to retain independent counsel of its choice or show cause why he has not done so on March 28, 2003. The Writ also set a briefing schedule for the filing of any opposition and reply concerning the issuance of the Writ.

On March 10, 2003, the defendant filed the three motions at issue here.[4] Because the motions challenged the Court's jurisdiction over the case, the Court expedited the briefing schedule and held the plaintiff's motion for preliminary injunction in abeyance until the jurisdictional issues were resolved.

On March 17, 2003, the plaintiff filed opposition briefs to the three motions to dismiss. On March 20, 2003, the defendant filed his reply briefs.

---

[3] *A.B. Won Pat Guam International Airport Authority v. Moylan*, Special Proceedings Case No. SP0055-03 ("Superior Court action").

[4] The defendant also filed a fourth motion – an *Ex Parte* Motion to Redact and Seal Confidential Communications – which this Court granted on March 11, 2003.

ANALYSIS

The defendant's three motions raise separate and distinct issues, which the Court will address separately below.

I. Motion to Dismiss for Failure to Name the Proper Defendant and Join an Indispensable Party

The defendant requested this Court to dismiss the Complaint against Mr. Thompson on the basis that the plaintiff had failed to name as a party to this action the Board of GIAA, which is charged with the execution of the statutory right to appoint legal counsel other than the Attorney General. The defendant contends that the Board of GIAA is clearly the proper party defendant, not Mr. Thompson, who does not have the statutory authority to appoint an independent attorney.

Pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure, the court may dismiss a claim for "failure to join a party under Rule 19." Rule 19, in turn, provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the

> claimed interest. If the person has not been so joined, the court **shall order** that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined Party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action. Fed. R. Civ. P. 19(a) (emphasis added).

As noted, the defendant maintains that this action cannot proceed without naming GIAA as a defendant because it is GIAA through its Board that has the statutory right to appoint independent legal counsel. *See Memorandum of Points and Authorities in Support of Motion to Dismiss for Failure to Name the Proper Defendant and Join an Indispensable Party* at 11. The Court concurs that GIAA is an indispensable party and, pursuant to Fed. R. Civ. P. 19(a), should be ordered to be made a party to this suit.

The plaintiff's opposition to this motion is, as the defendant describes, "largely irrelevant." *See Reply in Support of Motion to Dismiss for Failure to Name the Proper Defendant and Join an Indispensable Party* at 9. The plaintiff's opposition brief attempts to argue that the GIAA attorney is actually an "unclassified employee" of the Government of Guam subject to the personnel laws. Thus, the plaintiff alleges that the Executive Manager of GIAA has the authority to select said attorney. The plaintiff's opposition brief misses the point. What the defendant and the GIAA Board were attempting to do was enter into a contract for legal services, not hire in-house counsel who would be an unclassified employee. Thus, the personnel laws have no role in this dispute.

The plaintiff's failure to join an indispensable party is not fatal to this action since Rules 19(a) and 15(a) of the Federal Rules of Civil Procedure and the liberal policy behind them permit amendments to a party's pleading. Accordingly, the Court DENIES the motion to dismiss and permits the plaintiff to amend the Complaint to join the GIAA Board.[5]

II. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The defendant's second motion discusses two main grounds for dismissal. First, the defendant argues that the case should be dismissed because of a lack of federal question over the cause of action. Second, if the Court determines that a federal question is presented, the defendant contends that dismissal is warranted based upon the doctrine of federal abstention. These arguments are discussed in greater detail below.

A. Existence of a Federal Question

The defendant asserts that similar to the case of *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086 (9th Cir. 2002), this case does not raise a federal question, and thus dismissal is warranted. A quick review of the holding in the *Republican Party* case is helpful.

In the *Republican Party* case, the Ninth Circuit discussed the basic concepts of federal question jurisdiction. "The district courts shall have original jurisdiction of

[5] Amendment of the Complaint is not necessary in light of the Court's ruling *infra*.

all civil actions *arising under* the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (emphasis added). Furthermore, a case "arises under" federal law either (1) where federal law "creates the cause of action," or (2) "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 8-9, 103 S. Ct. 2841, 2846 (1983) (citations omitted). The Ninth Circuit went on to state:

> The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is present on the face of the plaintiff's properly pleaded complaint. . . . The well-pleaded complaint rule applies to declaratory judgment cases such as the present one. *Republican Party,* 277 F.3d at 1089.

Thus, the Court must begin its analysis by examining the Complaint and scrutinizing the relief plaintiff seeks. In the present case, the face of the Complaint alleges that jurisdiction arises under 48 U.S.C. § 1421g(d) of the Organic Act, which functions as Guam's constitution. As noted previously, the Organic Act states that "[t]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam." 48 U.S.C. § 1421g(d)(1). The complaint further asserts that a controversy exists under the Organic Act because GIAA, in its attempt to enter into a contract with a private attorney to provide it with legal services, is hindering the plaintiff's authority as the "Chief Legal Officer of the Government of Guam" to supervise litigation conducted by private counsel representing agencies and departments of the Government of Guam. The plaintiff thus asks this Court to declare that

the designation of Chief Legal Officer under the Organic Act preempts any local law which authorizes autonomous agencies to hire their own lawyers and litigate independently of the Attorney General.

The defendant contends that this type of declaratory action cannot support federal question jurisdiction. The defendant states that "what the Attorney General is asking for in the present case is only a slight variation from what the Guam Legislature asked of this Court in *Republican Party*." *Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction* at 9.

The defendant's reliance on *Republican Party,* however, is unavailing. In the *Republican Party* case, the plaintiff sought to enforce a local statute which required the Governor to choose at least three of Guam's Election Commission members from a list supplied by the Republican Party. The plaintiff there asserted that the Governor was not fulfilling his Organic Act duty to faithfully execute the laws of Guam. In defense, the then-Governor raised an Organic Act issue. The Ninth Circuit reversed on the basis that raising an Organic Act defense cannot confer federal question jurisdiction.

The plaintiff contends that this is not merely an "intra-governmental power struggle." Instead, this lawsuit seeks to enjoin an action by a government official on the basis that the action does not comply with federal law, specifically since the Organic Act dictates that the Attorney General shall be the "Chief Legal Officer of the Government of Guam." Thus, plaintiff contends that unlike the *Republican Party* case, this case is not merely an "intra-governmental power struggle." Rather, this action

involves a legal interpretation of the Organic Act, a federal law.

The Court concurs with the plaintiff. As stated by the Supreme Court in *Franchise Tax Bd.* and by the Ninth Circuit in *Republican Party,* here the vindication of a right under local law necessarily turns on construction of the Organic Act – a federal law. The Attorney General of Guam must seek to restrain an action of a local official relying on his authority created by local law which allegedly conflicts with the authority provided to the Attorney General under the Organic Act. Accordingly, this Court has subject matter jurisdiction over this action as it arises under a federal law. *See also United States v. Morros,* 268 F.3d 695 (9th Cir. 2001) (suit for declaratory and injunctive relief to determine whether Nuclear Waste Policy Act preempted state law under the Supremacy Clause arose under federal law, thus conferring jurisdiction upon federal court).

Equally unavailing is the defendant's reliance on the case of *Gutierrez v. Pangelinan,* 276 F.3d 539 (9th Cir. 2002) ("*Pangelinan*").[6] The defendant relies upon *Pangelinan,* to support his proposition that the Court has no federal jurisdiction over actions such as this which arise under the Organic Act. Specifically, the defendant relies on dicta in the *Pangelinan* case wherein the Ninth Circuit, in

[6] This case started out as an action in the Superior Court of Guam seeking a declaration that a bill passed by the Guam Legislature was not duly enacted. The Superior Court entered judgment for the defendants, which was reversed by the Guam Supreme Court on appeal. The defendants petitioned the Ninth Circuit for review. The Ninth Circuit granted the petition and affirmed the decision of the Guam Supreme Court.

determining what standard of review to apply, stated: "the congressional promise of independent institutions of government would be an empty one if we did not recognize the importance of the Guam Supreme Court's role in shaping the interpretation and application of the Organic Act." *Pangelinan*, 276 F.3d at 547. The defendant asserts that if this Court exercises jurisdiction over this matter, there is no meaningful way for the Guam Supreme Court to exercise its role in "shaping the interpretation and application of the Organic Act." The *Pangelinan* case, however, does not address federal subject matter jurisdiction. Thus, it is irrelevant to the present inquiry.

B. The Abstention Doctrines

Having found that this Court has subject matter jurisdiction over the action, the next issue is whether the Court will decline to proceed though it has jurisdiction. The courts have recognized various abstention doctrines. The parties have only discussed the doctrine of abstention established in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 760 (1971), but the Court will also analyze the *Burford*-type abstention, *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943).[7]

The doctrine of abstention established in *Younger* requires that a federal court not interfere with an ongoing state judicial proceeding that implicates important state interests where there is an adequate opportunity to raise

---

[7] While the parties do not specifically invoke the *Burford* doctrine, the parties do discuss whether this Court or the Guam Supreme Court has jurisdiction over matters relating to the professional conduct of attorneys. *See* discussion *infra*.

federal claims in the state proceeding. In *Younger,* the Supreme Court adopted a strong federal policy against federal court interference with pending state judicial proceedings. *See H.C. v. Koppel,* 203 F.3d 610, 613 (9th Cir. 2000). "Younger and [its progeny] express equitable principles of comity and federalism. They are designed to allow the State an opportunity to 'set its own house in order' when the federal issue is already before a State tribunal." *Ohio Bureau of Employment Serv. v. Hodory,* 431 U.S. 471, 479, 97 S. Ct. 1898, 1903 (1977). "Absent extraordinary circumstances, *Younger* abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." *Koppel,* 203 F.3d at 613 (quoting *The San Remo Hotel v. City & County of San Francisco,* 145 F.3d 1095, 1103 (9th Cir. 1998). If the *Younger* doctrine applies, the case must be dismissed. *Koppel*, 203 F.3d at 613.

In this case, the defendant asserts that all three requirements are met, and the Court agrees. First, there is an ongoing action in the Superior Court which presents identical issues to those raised in the instant case. The defendant asserts that the Superior Court action has progressed further than the action in this Court since the Writ in that case commanded the Attorney General to perform his statutory duties and permit GIAA to retain independent counsel of its choice as allowed under Guam law or show cause on March 28, 2003 why he has not done so. Second, there is no doubt that the proceedings in both the local and federal court implicate important local issues, that is the scope and powers of the Attorney General, the Legislature and the autonomous government agencies, and the Attorney General's responsibility to

establish legal policy for the Government of Guam. Third, the Superior Court action, which, as previously noted, raises identical issues to those present in this suit, provides the plaintiff with an adequate opportunity to litigate the Organic Act claims.

The plaintiff, on the other hand, argues that *Younger* abstention is not warranted in situations such as this where the federal action was filed before an identical state action is brought. The plaintiff asserts that "for the simple reason that unfortunately for [d]efendant, there was no 'pending' or 'ongoing' state proceeding, the doctrine of abstention cannot apply." *Opposition to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Defendant's Motion to Dismiss Based on Unsuitability of Declaratory Relief* at 11.

However, as the defendant notes in its reply brief, the test is not who made it first to the courthouse but whether "any proceedings of substance on the merits have taken place in the federal court." *Hicks v. Miranda,* 422 U.S. 332, 349, 95 S. Ct. 2281, 2292 (1975). In this case, while the Court has decided to address three motions involving procedural and jurisdictional issues, the Court has not addressed the *merits* of the action. The Superior Court of Guam, on the other hand, has progressed further in the local action. Additionally, on March 14, 2003, Judge Joaquin V.E. Manibusan, Jr. denied the Attorney General's request for a stay of the Superior Court action pending the outcome these motions. The Superior Court of Guam has indicated its intentions to swiftly address the merits of this dispute. Since all three criteria have been met, the Court must accordingly dismiss this case under *Younger*.

Additionally, under the *Burford* doctrine, where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of the state court. In *Burford* an oil company filed suit in federal court to attack the validity of a permit that the Texas Railroad Commission had granted. The Supreme Court held that although the federal court had diversity jurisdiction, it properly declined to rule on the merits since "the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide." *Burford,* 319 U.S. at 327, 63 S. Ct. at 1104.

"*Burford* allows federal courts to 'decline to rule on an essentially local issue arising out of a complicated state regulatory scheme.'" *Morros,* 268 F.3d at 705 (quoting *Knudsen Corp. v. Nevada State Dairy Comm'n,* 676 F.2d 374 (9th Cir. 1982)). Since it decided *Burford*, the Supreme Court has not provided a formulaic test for determining when dismissal under *Burford* is appropriate, although it has made it clear that the *Burford* abstention doctrine is an "extraordinary and narrow exception to the duty of the District Court to adjudicate a Controversy properly before it." *Ouakenbush v. Allstate Ins. Co.,* 517 U.S. 706, 727-28 (1996) (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976)). The Ninth Circuit, however, does require the presence of certain factors before a district court can abstain under *Burford.* The application of the *Burford* abstention doctrine requires:

> first that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; second, that the federal issues could not be separated easily from

> complex state law issues with respect to which state courts might have special competence; and third, that federal review might disrupt state efforts to establish a coherent policy. *Morros*, 268 F.3d at 705.

This case presents more than just an interpretation of a provision in the Organic Act of Guam. Rather, it involves complex local issues surrounding the professional conduct of attorneys. Whether the Attorney General can represent GIAA in all legal matters unrelated to this action requires interpretation and analysis of the Guam Rules of Professional Conduct relating to conflicts of interest. Can the Attorney General sue his own client (GIAA)? Does the Attorney General have a conflict of interest now that it has sued GIAA which prevents the Attorney General from representing GIAA in matters unrelated to this suit? Can the Attorney General concurrently represent two Government of Guam agencies in a legal dispute? These questions have been raised in the pleadings. The Guam Supreme Court and the Guam Bar Ethics Committee have jurisdiction over these matters, not this Court. The Supreme Court has ruled that the federal courts should abstain from interfering with the states' traditional exercise and control over the professional conduct of attorneys under their own statutes. *See Middlesex County Ethics Comm. v. Garden*, 457 U.S. 434-35, 102 S. Ct. 2515, 2522-23 (1982). Here, the local laws clearly give the Guam Supreme Court jurisdiction over the professional conduct and discipline of members of the Guam Bar. Additionally, the complex local issues surrounding attorney conduct cannot be easily separated from the federal question arising under the Organic Act. This Court cannot decide the federal question without implicating or infringing upon ethical matters reserved for the Guam Supreme Court. A decision by this

Court on the matter will also impede Guam's efforts to establish a coherent policy with regard to the standards for regulating attorney conduct. Accordingly, the Court dismisses this case under the *Burford* abstention doctrine as well as the *Younger* abstention doctrine. As the Supreme Court cautioned, "[d]elay, misunderstanding of local law, and needless federal conflict with the [s]tate policy, are the inevitable product of this double system of review." *Burford,* 319 U.S. at 327, 63 S. Ct. at 1104.

III. Motion to Dismiss for Unsuitability of Declaratory Relief

The last motion before the Court is a Motion to Dismiss for Unsuitability of Declaratory Relief. The Court has already dismissed this action by granting the defendant's second motion, *see supra,* however, in the interest of completely disposing of the three motions on their merits, the Court will discuss the arguments raised in the third motion.

The instant motion addresses the Court's discretion to dismiss pursuant to the Declaratory Judgment Act. The defendant asserts that even if there were a federal question and even if *Younger* abstention were not mandatory, the Court should nonetheless exercise its discretion to dismiss.

The pertinent portion of the Declaratory Judgment Act is quoted in footnote 1 *supra.* Jurisdiction under the Declaratory Judgment Act is discretionary for it is "deliberately cast in terms of permissive, rather than mandatory, authority." *Public Serv. Comm'n of Utah v. Wycoff Co.,* 344 U.S. 237, 250, 73 S. Ct. 236, 243-44 (1952) (J. Reed, concurring). The Declaratory Judgment Act "gave the

federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Associates v. Rickover,* 369 U.S. 111, 112, 82 S. Ct. 580, 581-82 (1962). This discretion, however, is not unfettered and a district court cannot decline such an action as a "matter of whim or personal disinclination." *Id.*

In deciding whether to exercise this discretionary jurisdiction over the federal declaratory action, the Court must look to several factors. The Ninth Circuit analyzed *Brillhart v. Excess Ins. Co. of America,* 316 U.S. 491, 62 S. Ct. 1173 (1942), and its progeny and stated:

> The *Brillhart* factors remain the philosophic touchstone for the district court. The district court should avoid needless determination of state law issues; it should discourage litigants from filing declaratory actions as a means of forum shopping; and it should avoid duplicative litigation. **If there are parallel state proceedings involving the same issues and parties pending at the time the federal declaratory action is filed, there is a presumption that the entire suit should be heard in state court. The pendency of a state court action does not, of itself, require a district court to refuse federal declaratory relief. Nonetheless, federal courts should generally decline to entertain reactive declaratory actions.** *Government Employees Ins. Co. v. Dizol,* 133 F.3d 1220, 1225 (1998) (citations omitted and emphasis added).

Based on the Ninth Circuit's guidance, the Court declines to exercise its discretionary jurisdiction under the Declaratory Judgment Act. In this case, there is an ongoing, identical action in Superior Court of Guam. As discussed

above in the analysis under the *Younger* abstention doctrine, the plaintiff will have an adequate opportunity to litigate the Organic Act claim before the Superior Court of Guam. There is also a compelling reason to have this matter decided by the local courts since it involves important local issues regarding the ability to set legal policy for the Government of Guam, The federal court will not get embroiled in this "intra-governmental dispute" between the Attorney General and the Executive Branch. The Declaratory Judgment Act was not meant for these types of actions. Accordingly, the Court grants the motion to dismiss.

CONCLUSION

In conclusion, the Court hereby DENIES the Motion to Dismiss for Failure to Name the Proper Defendant and Join an Indispensable Party. Additionally, the Court DENIES IN PART AND GRANTS IN PART the Motion to Dismiss for Lack of Subject Matter Jurisdiction. The Court finds that it has jurisdiction because this action arises under federal law, however, the Court will abstain from exercising such jurisdiction based on the *Younger* and *Burford* abstention doctrines. Finally, the Court GRANTS the Motion to Dismiss Based on Unsuitability of Declaratory Relief. Accordingly, this case is hereby DISMISSED.

SO ORDERED this 31st day of March, 2003.

/s/ John S. Unpingco
JOHN S. UNPINGCO
District judge

Supreme Court, U.S.
FILED
JUL 6 - 2005
OFFICE OF THE CLERK

(4)

No. 04-1480

IN THE

Supreme Court of the United States

DOUGLAS B. MOYLAN, Attorney General of Guam,

Petitioner,

v.

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY, by and through its Board of Directors,

Respondent.

On Petition For Writ of Certiorari to the Supreme Court of the Territory of Guam

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Robert M. Weinberg*
Assistant Attorney General
Office of the Attorney General of Guam
287 West O'Brien Drive
Hagåtña, Guam 96910 • USA
(671) 475-3324 • (671) 472-2493 (Fax)

**Counsel of Record for Petitioner*

QUESTION PRESENTED

Whether, in the absence of express authority from the United States Congress, the local Legislature for the Territory of Guam may alter, abridge, restrict or modify the powers and duties of the Attorney General of Guam, an Office established in the Organic Act of Guam by the United States Congress.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REASONS FOR GRANTING THE WRIT 2

I. THIS CASE INVOLVES SUBSTANTIAL AND DISPUTED MATTERS OF FEDERAL CONCERN AND CONGRESSIONAL INTENT. 2

II. FEDERAL PREEMPTION IS INAPPLICABLE TO THE ISSUES PRESENTED. 6

III. THAT THE POWER OF THE LOCAL LEGISLATURE "SHALL EXTEND TO ALL RIGHTFUL SUBJECTS" DOES NOT INCLUDE THE POWER TO NULLIFY AN ACT OF CONGRESS. 6

IV. RESPONDENT'S ARGUMENTS ON THE MERITS ARE PREMATURE AND DISTINGUISHABLE. 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

American Legion Post No. 279 v. Barrett, 20 N.E.2d 45 (Ill. 1939) 9

Attorney General of Guam v. Thompson, Civ. Case 03-00008 (D. Guam) 3

Brillhart v. Excess Ins. Co. of America, 316 U.S. 419 62 S. Ct. 1173 (1942) 4

Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098 (1943) 3, 4

Chase Manhattan Bank (National Association) v. South Acres Development Co., 434 U.S. 236, 98 S. Ct. 544 (1978) 2

Department of Mental Health v. Coty, 232 N.E.2d 686 (Ill. 1967) 9

Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002) 6, 7, 10

Gust K. Newberg, Inc. v. Illinois State Toll Highway Auth., 456 N.E.2d 50 (Ill. 1983) 8

Gutierrez v. Ada, 528 U.S. 250, 120 S. Ct. 740 (2000) 2

Lyons v. Ryan, 201 Ill.2d 529, 780 N.E.2d 1098 (Ill. 2002) 9

People ex rel. Castle v. Daniels, 132 N.E.2d 507 (Ill. 1956) 9

People ex rel. Hartigan v. E. & E. Hauling, Inc.

607 N.E.2d 165 (Ill. 1992) 8

Renell v. Southall Realty, 416 U.S. 363, 94 S.Ct. 1723 (1974) 7

Territory of Guam v. Olsen, 431 U.S. 195, 97 S. Ct. 1774 (1977) 2

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971) 3, 4

Statutes

48 U.S.C. § 1421g(d)(1) 1

48 U.S.C. § 1423a 6

INTRODUCTION

The decision of the Supreme Court of Guam is premised on a legally untenable proposition: That Congress may create the Office of Attorney General and Chief Legal Officer Government of Guam, in the Organic Act of Guam, 48 U.S.C. § 1421g(d)(1), but that the local Legislature of Guam may by local law, and without express authority delegated from Congress, alter, abridge, restrict or modify the powers and duties of that Office to the degree that it renders the Congressional enactment meaningless. The Guam Supreme Court's finding of implied authority delegated to the Legislature of Guam that is expressly delegated with respect to every other office described with the same provision of the law is an affront to Congressional intent and this Court's standards of statutory construction.

Respondent's Brief in Opposition to Petition for Writ of Certiorari demonstrates precisely why the decision of the Guam Supreme Court is in error. It argues a point not in dispute – that state and territorial courts are presumed competent to decide issues of federal law – in order to avoid addressing the merits of the argument that in this instance the Supreme Court of Guam misinterpreted federal law and misapplied this Court's standards of statutory construction in ascertaining Congressional intent. In contradistinction to almost every other local office mentioned in the Organic Act of Guam, Congress intentionally declined to authorize the local Legislature to define the parameters of the authority conferred upon the Attorney General and Chief Legal Officer for the Government of Guam.

Respondent's "preemption" discussion is non-responsive to the question of Congressional intent in amending the Organic Act. And Respondent's citation to case law from distinguishable jurisdictions which purports to

address the merits of its arguments in opposition to the question presented is simply premature.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES SUBSTANTIAL AND DISPUTED MATTERS OF FEDERAL CONCERN AND CONGRESSIONAL INTENT.

By Respondent's reasoning, no case arising under the Organic Act of Guam seeking an interpretation of Congressional intent would present an issue worthy of review by this Court. But such reasoning is directly contrary to this Court's analysis of the *federal* concerns in granting certiorari in *Territory of Guam v. Olsen,* 431 U.S. 195, 97 S. Ct. 1774 (1977); *Chase Manhattan Bank (National Association) v. South Acres Development Co.*, 434 U.S. 236, 98 S. Ct. 544 (1978) (per curiam); and *Gutierrez v. Ada*, 528 U.S. 250, 120 S. Ct. 740 (2000). And Respondent's facile distinctions of this Court's precedents, and characterization of the question presented as a mere "intergovernmental dispute," Opposition at p. 13, are simply unresponsive to the fact that a local territorial court has misconstrued a federal law to the effect that Congressional intent is nullified.

Respondent correctly characterizes this Court's holding in *Olsen* to be that "the Guam Legislature was not authorized to divest the local federal court, the District Court of Guam, of appellate jurisdiction in cases turning on questions of federal law," but seeks to distinguish it on the basis that "the instant case implicates no such attempt to deprive the District Court of any jurisdiction." Opp. Brief at pp. 12, 13. But Respondent misses the point entirely. In *Olsen*, Congress created an Article IV court, and this Court

held that the local Legislature was without express authority to limit its jurisdiction in federal question cases. "[W]e should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law." *Olsen*, 431 U.S. at 201, 97 S. Ct. at 1778-79. In the instant case, absent express authority and a "clear signal from Congress" which established the Office of Attorney General in the Organic Act, the Legislature of Guam is not authorized to alter, amend, abridge or modify the powers and duties of that Office.

In the case filed first in the District Court of Guam by the Attorney General of Guam against the Airport Manager, *Attorney General of Guam v. Thompson,* Civ. 03-00008, *see* Opposition, App. 1, the District Court of Guam acknowledged that there it had federal question jurisdiction to hear the matter, but then invoked *Younger* and *Burford* abstention to decline jurisdiction over a decidedly federal question of law.[1] The District Court also purported to

---

[1] *See Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971); and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943). Respondent's misdirected references to the District Court of Guam's reversible error in abstaining from deciding the identical question presented in the "closely-related federal case entitled, *Attorney General of Guam v. William R. Thompson*, D. Guam Civ. Case No. CV03-00008," Opposition, pp. 1, 6 and 12, and appendix, merely demonstrate not only that the Supreme Court of Guam was in error, but that Respondent was also able to persuade a federal district court to abdicate its unflagging obligation to decide properly presented questions of federal law as well. Assuming the Attorney General prevails on appeal, and the Ninth Circuit reverses and remands the District Court of Guam's abstention order, if this Court does not grant certiorari and review the decision of the Supreme Court of Guam, the Respondent will likely invoke the Rooker-Feldman doctine, and *res judicata* to the effect that this pure question of federal law and Congressional intent in amending the Organic Act of Guam will escape substantive review by any federal court.

exercise its "discretion" to decline jurisdiction under the so-called *Brillhart* factors, *see Brillhart v. Excess Ins. Co. of America*, 316 U.S. 419, 62 S. Ct. 1173 (1942).[2] But that court was in error to abstain for the same reasons that this case raises an issue of substantial federal concern that is due to be heard by this Court.

That Congress was aware of the mischief that would follow if agencies and instrumentalities were permitted to retain their own attorneys who were not answerable to one Chief Legal Counsel is demonstrated by two letters, one from the Compiler of Laws to Delegate Underwood dated July 16, 1997 forewarning Congress of the evils of the existing system on Guam with its multiple legal fiefdoms; and one dated April 2, 2003 to the Attorney General by counsel for the Guam International Airport Authority after the amendment to the Organic Act had become law.

Respondent's Opposition at page 4 quotes from the July 16, 1997 letter from the Compiler of Laws, Charles H. Troutman to Congressman Robert Underwood. Respondent is correct to note that the Compiler did not see the use of outside counsel as something that should eliminated. But Mr.

---

[2] The *Brillhart* factors have only been applied in actions where jurisdiction was based on diversity of citizenship, as opposed to federal question jurisdiction, and where the questions to be decided involved the interpretation of state, not federal, law. "Ordinarily, it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, *not governed by federal law*, between the same parties." *Id.* 316 U.S. 495, 62 S. Ct. 1175-76 (emphasis added). The District Court unquestionably erred in its analysis of *Younger* and *Burford* abstention, and in its application of *Brillhart*. That matter is presently pending on appeal before the Ninth Circuit, but unless this Court grants certiorari in this case, a reversal by the Ninth Circuit will still not address the federal issue presented.

Troutman went on to state that an important purpose to be served in amending the Organic Act was to keep a check on the various legal empires within the government of Guam.[3] Based in experience, Mr. Troutman's concerns became reality in this very case. On April 2, 2003, counsel for the Airport Authority sent the Attorney General a letter purporting to direct the relationship between the Attorney General and the Authority with respect to the Attorney General's efforts to conduct criminal investigations, which by necessity require the cooperation of an agency and instrumentality of the Government of Guam. The letter from the Airport Authority's counsel in part *commands*: "Inasmuch as this firm represents GIAA in all of its legal affairs . . . you are required to communicate with GIAA through our office." Letter from David Mair to Attorney General, Appendix to Reply to Opposition, at A-2, 3. The intent of this peremptory language, and the effect of the decision of the Guam Supreme Court, was to remove from the Attorney General and "Chief Legal Officer of the Government of Guam" any legal oversight or participation in the legal affairs of an instrumentality of the Government of Guam, unless its *private* counsel permits it. Had Congress intended that result, in need not have amended the Organic Act in the first place.

---

[3] Mr. Troutman wrote, "I do not see this language as eliminating the use of outside counsel for various agencies, but would keep a check on having many and diverse legal 'empires' within the Government of Guam. This is the same idea expressed in the 1970 Illinois Constitution." Pet. App. D-2. The question thus has always been who would be authorized under Guam's Organic Act to keep a "check on having many and diverse legal 'empires' within the Government of Guam." It will be significant to the analysis on the merits of this petition that the Illinois model was suggested by the Compiler as a point of reference.

II. FEDERAL PREEMPTION IS INAPPLICABLE TO THE ISSUES PRESENTED.

Respondent argues correctly that "this Court starts with the presumption that the power of the states are not to be superceded by federal law," Opposition, p. 25. But Guam is not a state and, unlike the several states, the powers of its Legislature are express and defined delegations of legislative authority from Congress, not inherent powers of a sovereign. As noted by the Ninth Circuit U.S. Court of Appeals, "Congress has the power to legislate directly for Guam or to establish a government for Guam subject to congressional control, and except as Congress may determine, Guam has no inherent right to govern itself." *Guam v. Guerrero,* 290 F.3d 1210, 1214 (9th Cir. 2002) (citations omitted).

Federal "preemption" of local laws is a non-issue; what is the issue is what authority Congress intended to delegate to the local Legislature to define the powers and duties of the Attorney General for the Territory of Guam.

III. THAT THE POWER OF THE LOCAL LEGISLATURE "SHALL EXTEND TO ALL RIGHTFUL SUBJECTS" DOES NOT INCLUDE THE POWER TO NULLIFY AN ACT OF CONGRESS.

The fact that the Organic Act of Guam now provides that the power of the local Legislature shall extend to "all rightful subjects of legislation," by its own terms expressly limits that power to those "subjects of legislation not inconsistent with the provisions of this chapter [Organic Act] and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a. The question presented here is whether the local Legislature has been delegated the authority to legislate in this field at all, for if not, the exercise of such powers is "inconsistent with the provision of" the Organic Act.

Respondent trivializes the substantial federal question of Congressional intent in determining the parameters of Guam's self-governance, to reduce it to a mere territorial decision "of local concern," as though this were an issue of local law passed by the local Legislature whose interpretation by the local courts is entitled to deference.[4] Opposition at pp. 10, 11. But no presumption of deference is due, because an interpretation by local courts of *local* laws is not the issue. The issue is whether a local Legislature is even authorized by *federal* law to enact the laws in question. Reviewing a decision of the Guam Supreme Court interpreting the Organic Act, the Ninth Circuit has opined that, although courts will give deference to interpretation of local issues, "we cannot ignore the fact that § 1421b(a) is a federal statute dealing with an issue of federal constitutional import, not a local law. As such, we employ a de novo standard of review" *Guerrero*, 290 F.3d at p. 1214. No deference is due to the local courts when interpreting what *Congress* intended in amending Guam's Organic Act.

IV. RESPONDENT'S ARGUMENTS ON THE MERITS ARE PREMATURE AND DISTINGUISHABLE.

At pp. 19 – 21, and 24 of its Opposition, Respondent cites case law from Kentucky, Missouri, North Dakota, Arizona, Utah, New Jersey, New York, California,

---

[4] Had Congress considered the Office of Attorney General to be merely a matter of "peculiarly local, territorial concern," Opposition, p. 10, Respondent's arguments may have some weight. But even under *Renell v. Southall Realty*, 416 U.S. 363, 94 S.Ct. 1723 (1974), cited at pp. 10, 11 of Respondent's brief, the conclusion is ineluctable that the court below committed "egregious error," *id.*, 416 U.S. at 368-369, 94 S.Ct. at 1726. Congress did not delegate to the local Legislature the authority to "prescribe by law" the parameters of the Attorney General's powers and duties, as it had elsewhere in the Organic Act of Guam for other offices it established or authorized the local Legislature to create.

Oklahoma and Florida for the general proposition that local legislatures *in those jurisdictions* may legislatively alter, amend or modify the powers and duties of their respective Attorneys General.[5] The discussion is premature. Even so, as stated in Petitioner's opening brief, while the local Legislature may once as a matter of local law have been authorized to increase or add to the powers and duties of the Attorney General, to alter, diminish, abridge or modify those powers of an office that it itself had created, given the "constitutional" status of the Office now in the Organic Act, without express authority, the local Legislature is not authorized to alter, abridge, restrict or modify the powers and duties of that Office as established by Congress.

The jurisdiction recommended to Congress by the Compiler of Laws as an example of the kind of Office of Attorney General that should be adopted for Guam is the State of Illinois. In states where the Office of Attorney General is constitutionally established, like Illinois, the Attorney General's powers are regarded as powers that could not be diminished by local legislation. *See, e.g., Lyons v. Ryan*, 201 Ill.2d 529, 381-82, 780 N.E.2d 1098, 1105-06 (Ill. 2002); *People ex rel. Hartigan v. E. & E. Hauling, Inc.*, 607 N.E.2d 165, 170 (Ill. 1992) ("although the legislature may add to the Attorney General's common law powers, it may not detract from them"); *Gust K. Newberg, Inc. v. Illinois State Toll Highway Auth.*, 456 N.E.2d 50, 67 (Ill. 1983) ("while the legislature may add to his powers, it cannot reduce the Attorney General's common law authority in

[5] Even if it was true, and the Attorney General contests this point, it does not matter that "Guam's Legislature, like the legislatures of most states, has expressly empowered certain government agencies, such as GIAA, to retain independent counsel." Opposition at p. 21. What matters is whether the Guam Legislature itself is authorized by Congress under the Organic Act to "prescribe by law" the powers and duties of the Office of Attorney General.

directing the legal affairs of the state"); *Department of Mental Health v. Coty*, 232 N.E.2d 686, 689 (Ill. 1967) ("the common-law powers of the Attorney General were preserved to him by the constitution and while the General Assembly can impose additional power and duties upon him, it cannot strip him of his common-law powers"); *People ex rel. Castle v. Daniels*, 132 N.E.2d 507, 509 (Ill. 1956) ("the Attorney General, whose office is created by the Illinois constitution, ... is the chief law officer of the State and has those powers which resided in the Attorney General at common law.... and neither the legislature nor the courts can deprive him of his constitutionally granted authority"); *American Legion Post No. 279 v. Barrett*, 20 N.E.2d 45, 51 (Ill. 1939) ("the General Assembly may not take away from a constitutional officer the powers or duties given him by the constitution"). Similarly, under the Guam's Organic Act, its "constitution," unless the local Legislature is expressly authorized to "prescribe by law" the powers and duties of the Office of Attorney General, it may not do so.[6]

But discussion of distinguishable case law from incompatible jurisdictions cited by the Respondent is premature. Should this Court grant the Petition for Writ of Certiorari, the question will be whether Congress intended to delegate authority to the Legislature of Guam to alter,

---

[6] The Supreme Court of Guam simply failed to comprehend the significance of the Compiler of Law's references to Illinois, and failed to adequately address the simple fact that a legislature must be expressly authorized by its state's constitution to "prescribe by law" the powers and duties of a constitutional officer. A careful analysis of each of the jurisdictions cited by the Respondent reveals that each state's constitution authorized the local legislature to prescribe by law the powers and duties of its Attorney General. That cannot be said of Guam's Organic Act. There is no express delegation of authority to the local Legislature to alter, amend or abridge the powers and duties of this Office created by the Congress, and there is no legal authority endorsed by this Court that permits the courts to imply such authority.

amend, abridge or modify the powers and duties of an Office it created. Congress did not.

CONCLUSION

No mere trifle of local law is at issue here. Guam is not a state and has no inherent sovereignty; "and except as Congress may determine, Guam has no inherent right to govern itself." *Guerrero,* 290 F.3d at 1214. It is therefore a question of substantial federal concern as to what Congress intended for the self-governance of the Territory of Guam. One federal court has already abdicated its unflagging obligation to decide this substantial question of federal law. This Court should grant this Petition and settle a serious and continuing dispute over the interpretation of a Congressional enactment, the Organic Act of Guam.

Respectfully submitted,

ROBERT M. WEINBERG
Assistant Attorney General
Counsel of Record
Guam Attorney General's Office
287 West O'Brien Drive
Hagåtña, Guam 96910 USA
Telephone: (671) 475-3324
Telecopy: (671) 472-2493

Counsel for Petitioner

APPENDIX

MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation
Suite 807, GCIC Building
414 West Soledad Avenue
Hagåtña, Guam 96910

Telephone (671) 472-2089/90
Facsimile (671) 477-5206

April 2, 2003

VIA FACSIMILE ONLY 472-2493

The Honorable Douglas B. Moylan
Attorney General of Guam
Office of the Attorney General
120 West O'Brien Drive
Suite 2-200E, Guam Judicial Center
Hagåtña, Guam 96910

Re: Criminal/Civil Investigations

Dear Mr. Moylan:

This is in response to your letters dated April 1, 2003, wherein you make reference to certain criminal and civil investigations that you wish to conduct involving the past practices of the Guam International Airport Authority during the prior administration. Please be assured that the current Directors and Management of GIAA share your concern over certain actions and expenditures during the prior administration and they welcome your interest in investigating these activities.

After the new administration was sworn into office, the newly-appointed Directors and Executive Manager of

GIAA began an extensive review of the prior financial transactions at the Airport. As a consequence of their diligent work, the current Directors and Executive Manager discovered numerous questionable transactions, including, but not limited to: (1) the Governor statues and Airport Executive Lounge; (2) the Tutujan (Triangle) Park Project; (3) the Guam Employees' Association Generator Sales Project; (4) extensive travel during the last few months of the prior administration; (5) China Link; and (6) failing to follow the procurement laws of Guam. It is the current Directors and Executive Manager who discovered these matters and it is they who have brought them to the attention of the public.

Prior to receipt of your April 1, letters, the Directors and/or Executive Manager of GIAA had already requested that this office review the transactions referred to in your letters. These investigations have already commenced. In the event that GIAA uncovers any civil wrongdoing, GIAA will file the appropriate judicial proceedings against the wrongdoers. In regard to criminal investigations, GIAA will of course cooperate with the United States Attorney and your office to make sure that any violations of the law are properly prosecuted. GIAA has already been in contact with the United States Attorney.

While GIAA and your office have a mutual interest in investigating any wrongdoing, it is undisputed that GIAA and your office are taking adverse positions in certain civil lawsuits. For this reason, GIAA prefers to have communications between GIAA and the Attorney General's Office channeled through this office.

This is consistent with the ethical requirements of our profession which prohibit your office from communicating directly with a party whom you know to be represented by counsel. Inasmuch as our firm represents GIAA in all of its

legal affairs, including those items specified in your April 1, 2003 letters, you are required to communicate with GIAA through our office. This will not result in any delay in any criminal investigation. To the contrary, our firm's familiarity with GIAA and the relevant documents may actually expedite any investigations that you wish to conduct.

There are additional reasons to have communications routed through the offices of GIAA's counsel. It is important for GIAA to preserve any evidence relating to its financial transactions; particularly those that might be the subject of investigations. It is very possible that federal investigators may also wish to review documentation relating to transactions during the prior administration. The preservation of evidence will be facilitated if the exchange of the documents is coordinated through counsel.

GIAA is currently reviewing your request for specific documents relating to the Chinese Terracotta Warrior Exhibit; Birdman Rally; Governor statues and Airport Executive Lounge; Tutujan (Triangle) Park Project; and GIAA Employees' Association Generator Sales Project. We will respond to this request in a timely manner consistent with GIAA's obligations under the law. Please let us know immediately if there is any particular order in which you would like the documents to be produced.

In closing, GIAA looks forward to having a good working relationship with your office regarding the investigations that you wish to conduct. Please have your investigators contact my office regarding any interviews that they may wish to conduct. We look forward to hearing from you.

Best regards,

DAVID A. MAIR

DAM:lbe

cc: Mr. Frank Blas
Mr. William R. Thompson

(3)

NO. 04-1480

Supreme Court, U.S.
FILED
SEP 12 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DOUGLAS B. MOYLAN
Attorney General of Guam,

Petitioner,

v.

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY,
by and through its Board of Directors,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Guam

RESPONDENT'S SUPPLEMENTAL BRIEF

DAVID A. MAIR*
RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation
Attorneys at Law
238 A.F.C. Flores Street
Suite 801, Pacific News Building
Hagåtña, Guam 96910
Telephone: (671) 472-2089/2090

**Counsel of Record for Respondent*

QUESTION PRESENTED

Whether the Supreme Court of Guam erred in holding that the Organic Act's description of the Guam Attorney General as "Chief Legal Officer does not preclude the Guam Legislature from allowing Guam government agencies, such as Respondent GIAA, to retain private counsel.

INTRODUCTION

This brief is being filed pursuant to Supreme Court Rule 15.8, in order to call the Court's attention to a new case, not available at the time Respondent A.B. Won Pat Guam International Airport Authority ("Respondent" or "GIAA") submitted its last filing. Specifically, Respondent wishes to call the Court's attention to the August 16, 2005 Opinion issued by the Ninth Circuit Court of Appeals in the case styled as *Attorney General of Guam v. Jesus Q. Torres*, Nos. 03-15823, 03-15999, Slip. Op.,___ F.3d ___, 2005 U.S. App. LEXIS 17229 (9th Cir. 2005) ("Ninth Circuit Opinion").[1] The Ninth Circuit Opinion affirmed the District Court of Guam's April 1, 2003 dismissal of the Attorney General's federal suit seeking declaratory and injunctive relief concerning the identical controversy which is the subject of the instant Petition for *certiorari*. *See Attorney General of Guam v. William R. Thompson (GIAA Exec. Mgr.)*, D. Guam Civ. Case No. 03-0008 (Order, April 1, 2003). Resp. App. 1.

ANALYSIS

I.

THE NINTH CIRCUIT OPINION IS RELEVANT TO THE PETITION

The Ninth Circuit Opinion is relevant to the pending Petition if for no other reason than because both parties have

---

[1] A copy of the Opinion appears in the Appendix to this brief. Respondent notes that the Mandate has not yet issued by the Ninth Circuit, and that Petitioner herein has filed a petition for rehearing and suggestion for rehearing *en banc*.

referred to the underlying District Court decision, as well as the pendency of the Ninth Circuit appeal, in their respective filings in this Court.

Respondent referred to the matter in its brief in opposition under the section labeled "Opinions Below." Respondent observed that the District Court of Guam held in the underlying case that the *Younger* and *Burford* abstention doctrines, as well as the Declaratory Judgment Act, counseled against federal court consideration of the identical issues raised in the case *sub judice*. *Id.* at 1. Respondent expressly noted that, "the appeal remains pending as of the date of this brief." *Id.* Respondent also referred to the District Court's decision, in the margin, in referring to the Petitioner's argument that no Article III court has sat to entertain Petitioner's case. *Id.* at 12, n.8.

Likewise, Petitioner also referred to the lower court decision and the pendency of the appeal. For example, in Petitioner's Reply Brief, he refers to the underlying District Court decision as constituting "reversible error" because, in Petitioner's view, Respondent "was able to persuade a federal district court to abdicate its unflagging obligation to decide properly presented questions of federal law . . . ." *Id.* at 3, n. 1.[2] Petitioner deemed Respondent's reference to the

---

[2] The Petitioner continued, "Assuming the Attorney General prevails on appeal, and the Ninth Circuit reverses and remands the District Court of Guam's abstention order, if this Court does not grant *certiorari* and review the decision of the Supreme of Guam, the Respondent will likely invoke the *Rooker-Feldman* doctrine, and res judicata to the effect that this pure question of federal law and Congressional intent in amending the Organic Act of Guam will escape substantive review by any federal court. *Id.*

District Court's decision as "misdirected." *Id.* Petitioner also boldly proclaimed, ". . . [t]hat court was in error to abstain for the same reasons that this case raises an issue of substantial federal concern that is due to be heard by this Court."[3] *Id.*

II.

THE NINTH CIRCUIT OPINION BOLSTERS RESPONDENT'S ASSERTION THAT THE PETITION LACKS MERIT

Respondent respectfully submits that the Ninth Circuit Opinion, affirming the District Court's decision, sets forth a reasoned and well-founded rebuttal to the Petitioner's contention that the instant Petition presents substantial issues of federal concern. In fact, the Ninth Circuit Opinion bolsters Respondent's contention that federal courts, including this Court, have demonstrated "a long-standing 'reluctance to review' decisions of territorial courts interpreting federal statutes of peculiarly local concern." *See Resp. Brief* at 7, *quoting Pernell v. Southall Realty*, 460 U.S. 363, 366-368 (1974).

For example, in affirming the trial court's decision to abstain on grounds of the *Younger* doctrine, the Ninth Circuit relied on authority from the District of Columbia Circuit and the First Circuit in concluding that the courts of Guam are to be treated as "state" courts for purposes of the *Younger* abstention doctrine. App. 13-14. The Ninth Circuit also echoed its earlier precedents recognizing that Congress has specifically required that relations between the federal courts

---

[3] A copy of the District Court's decision in the case was made part of the Appendix to Respondent's Brief in Opposition.

and Guam's local courts be the same as those between the federal and state courts. App. 15-16, *citing Guam v. Yang*, 850 F.2d 507, 510 (9th Cir. 1988) (*en banc*) overruled on other grounds by *U.S. v. Keys*, 133 F.3d 1282 (9th Cir. 1998) (*en banc*); *Western Systems, Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992); *EIE Guam Corp. v. Long-Term Credit Bank of Japan, Ltd.*, 322 F.3d 635 (9th Cir. 2003). As the court stated: "Most recently, following the creation of the Guam Supreme Court, we held that we 'apply a deferential standard of review to [the] Guam Supreme Court concerning local law' and also 'must take into account Congress' clear intent to allow the Guam Supreme Court to develop Guam's common law. '" App. 16, *quoting Heuser v. Department of Law*, 368 F.3d 1091, 1097 (9th Cir. 2004).[4] Thus, the Ninth Circuit concluded that the District Court of Guam properly deferred to the proceedings in Guam's courts under the *Younger* abstention doctrine. App. 16. The Ninth Circuit said:

> Prior to the 1998 Amendment to the Guam Organic Act, GIAA was authorized to retain independent counsel. **The District Court action would have interfered with the branches of Guam's government working out the impacts of the 1998 Amendment.** Finally, the District Court's retention of Appellant's case might 'reflect negatively' on Guam's ability to enforce

---

[4] It is notable that the Ninth Circuit's Opinion makes reference to the petition for *certiorari* filed in the instant proceedings. *See* App. 13-14, quoting Petitioner's petition for the proposition that the Guam court proceedings provided Petitioner with an adequate remedy for its grievances for purposes of the *Younger* abstention doctrine.

> federal laws. Id. Thus, although we recognize that Guam is not a state, we conclude that Guam's courts may be treated as state courts for the purpose of applying the *Younger* abstention doctrine.

App. 14 (footnote omitted and emphasis added).

CONCLUSION

The Court is asked to consider the Ninth Circuit's August 16, 2005 Opinion affirming dismissal of Petitioner's federal-court action involving the identical controversy raised in the Petition. That decision bolsters Respondent's contention that the Petitioner has failed to set forth adequate grounds justifying the grant of *certiorari* by this Court.

Dated this 9th day of September, 2005.

Respectfully submitted,
DAVID A. MAIR*
RANDALL TODD THOMPSON

* *Counsel of Record for Respondent*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE ATTORNEY GENERAL OF GUAM,
Plaintiff-Appellant/
Cross-Appellee,

v.

JESUS Q. TORRES, * in his official capacity as Executive Manager of Guam Airport Authority,
Defendant-Appellee/
Cross-Appellee.

Nos. 03-15823
03-15999

D.C. No.
CV-03-00008

OPINION

Appeal from the United States District Court
for the District of Guam
John S. Unpingco, District Judge, Presiding

Argued and Submitted
May 11, 2005—Honolulu, Hawaii

Filed August 16, 2005

Before: Dorothy W. Nelson, Consuelo M. Callahan, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Callahan

*Jesus Q. Torres is substituted for his predecessor, William R. Thompson, as Executive Manager of the Guam Airport Authority. Fed. R. App. P. 43(c)(2).

SUMMARY

Civil Litigation and Procedure/ Jurisdiction — Federal Question

The court of appeals affirmed a judgment of the district court. The court held that Guam's courts may be treated as state courts for the purpose of applying the *Younger* abstention doctrine.

Appellant the Attorney General of Guam filed an action in federal district court in Guam seeking a declaration that, under the 1998 Amendment to the Guam Organic Act, 48 U.S.C. § 1421g(d), his authority as the chief legal officer of Guam preempted prior Guam law and prohibited appellee the Guam International Airport Authority (GIAA) from retaining its own legal counsel to conduct civil litigation. The district court, noting the existence of a parallel action in the Guam superior court, dismissed the action on three separate grounds, including abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

The Attorney General appealed.

[1] Absent extraordinary circumstances, *Younger* abstention is proper when there are ongoing state judicial proceedings; the proceedings implicate important state interests; and the state proceedings provide the plaintiff with an adequate opportunity to raise the federal claims. There was no question that these conditions had been met. **[2]** The relevant question was whether proceedings in Guam's courts could be treated as state judicial proceedings and accordingly, in this case, triggered the application of *Younger* abstention.

[3] The evolution of the *Younger* abstention doctrine has confirmed that it is based on considerations of equity and comity. Another critical concern appears to be whether the local court provides the plaintiff with an adequate opportunity

to litigate his or her federal claims. [4] The D.C. Circuit has determined that the District of Columbia's lack of statehood does not bar the application of *Younger* abstention to proceedings in its local courts, noting that the equitable principles underlying the *Younger* abstention doctrine applied in full measure to the District of Columbia, and concluding that all the comity concerns underlying the doctrine applied with equal force to the District of Columbia. [5] The application of the policies underlying the *Younger* abstention doctrine to Guam produced the same result. First, in light of the pending action in Guam's superior court, maintaining the federal action would have been duplicative. Second, there was no doubt that the local action provided the Attorney General with an adequate remedy. Third, the district court action would have interfered with the branches of Guam's government working out the impacts of the 1998 Amendment. Finally, the district court's retention of the Attorney General's case might reflect negatively on Guam's ability to enforce federal laws. Thus, although Guam is not a state, it had to be concluded that Guam's courts may be treated as state courts for the purpose of applying the *Younger* abstention doctrine. [6] This determination was consistent with the First Circuit's decision implicitly equating Puerto Rico with a "state" for purposes of *Younger* abstention.

[7] As it did for the District of Columbia, Congress has also enacted legislation concerning Guam that supported treating Guam's courts as if they were state courts. [8] The statute provides that the relations between federal courts and Guam's courts should be similar to those between federal and state courts, and abstention appeared to fall within the other matters or proceedings governed by that relationship. [9] Finally, deference to Guam's courts under the *Younger* abstention doctrine was consistent with prior Ninth Circuit cases. The Ninth Circuit has recognized that Congress has specifically required that relations between the federal courts and Guam's local courts be the same as those between the federal and state courts; [10] that the territorial courts in Guam qualify as state

courts for the purpose of 28 U.S.C. § 1441(d); and **[11]** that the court of appeals applies a deferential standard of review to the Guam Supreme Court concerning local law. **[12]** It had to be concluded that the district court properly deferred to the proceedings in Guam's courts under the *Younger* abstention doctrine. The judgment of the district court had to be affirmed.

COUNSEL

Plaintiff-appellant-cross-appellee was represented by Robert M. Weisberg, Assistant Attorney General of Guam, at oral argument, and by Robert M. Weisberg and J. Basil O'Mallan III, Deputy Attorney General of Guam on the briefs, all of Hagatna, Guam.

Defendant-appellee-cross-appellant was represented by Randall Todd Thomspon of Mair, Mair, Spade & Thomspon of Hagatna, Guam.

OPINION

CALLAHAN, Circuit Judge:

The Attorney General of Guam filed this action in the United States District Court of Guam seeking a declaration that, under the 1998 Amendment to the Guam Organic Act, 48 U.S.C. § 1421g(d), his authority as the "Chief Legal Officer" of Guam preempted prior Guam law and prohibited the Guam International Airport Authority ("GIAA") from retaining its own legal counsel to conduct civil litigation. The district court, noting the existence of a parallel action in the Guam superior court, dismissed the action on three separate grounds: abstention under *Younger v. Harris*, 401 U.S. 37 (1971), abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315

(1943), and because the action was unsuitable for relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. We affirm the district court's dismissal of the action as appropriate under *Younger* abstention. We also affirm the district court's dismissal under the Declaratory Judgment Act because appellant waived his challenge to this dismissal.[1]

A. *Background*

On March 3, 2003, appellant filed a complaint in the district court for injunctive and declaratory relief. He alleged that the United States Congress, when it amended the Guam Organic Act in 1998, provided that the Attorney General of Guam "shall be the Chief Legal Officer of the Government of Guam," and that this language preempted prior Guam law and denied GIAA the authority to retain its own legal counsel, instead of appellant, to conduct civil actions.[2]

Prior to the 1998 Amendment, pursuant to 12 GUAM CODE ANN. § 1108 and 5 GUAM CODE ANN. § 30109, GIAA was authorized to retain outside counsel and to use its own legal counsel in civil actions.[3] In 2003, after the current Attorney

[1]As we may affirm the district court on any one of the three separate grounds it advanced for dismissing appellant's action, we need not review the district court's dismissal under *Burford*.

[2]In relevant part, 48 U.S.C. § 1421g(d) reads:

> (1) The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam. At such time as the Office of the Attorney General of Guam shall next become vacant, the Attorney General of Guam shall be appointed by the Governor of Guam with the advice and consent of the legislature, and shall serve at the pleasure of the Governor of Guam.

[3]12 GUAM CODE ANN. § 1108 provides, in pertinent part:

> (a) The [GIAA] Board may also appoint a treasurer, a controller, and an attorney, all of whom shall serve at the pleasure of the Board. Their duties and compensation shall be fixed by the Board.

General of Guam was sworn in, he adopted the position that the 1998 Amendment preempted prior laws that allowed GIAA and other entities to retain independent counsel.

On February 13, 2003, GIAA sent a letter to appellant. The letter (1) asserted that GIAA had statutory authority to retain private counsel, (2) noted pending civil actions concerning a construction contract at the airport, (3) asked for temporary legal assistance from appellant, and (4) suggested that the contested contract be immediately awarded to one of the competing contractors. Appellant attached a copy of this letter to his complaint. GIAA requested that the letter be sealed as a confidential communication. On March 28, 2003, the district court determined that the letter was privileged as an attorney

---

. . .

> (c) The Attorney, who must have been admitted to the practice of law in Guam, shall advise the Board and the Executive Director on all legal matters to which the Authority is a party or in which the Authority is legally interested, and may represent the Authority in connection with legal matters before the Legislature, boards and other agencies of the Territory or of the United States. The Attorney for the Authority shall represent the Authority in litigation concerning the affairs of the Authority.

45 GUAM CODE ANN. § 30109(c) states that the Attorney General of Guam shall, *inter alia*,

> [c]onduct on behalf of the government of Guam all civil actions in which the government is an interested party; provided that those branches, departments or agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General.

Also, the Compiler of Law comment to subsection (c) of 5 GUAM CODE ANN. § 30109 notes that subsection (c) "has been amended by PL 18-04:5, to conform to the other laws which give to specific agencies the authority to hire their own lawyers, who may undertake litigation without the supervision of the Attorney General." 5 GUAM CODE ANN. § 30109 comment. These agencies include GIAA. *Id.*

client communication and ordered the filing of a redacted version of the letter.[4]

Meanwhile, on March 7, 2003, four days after appellant filed his action in the district court, GIAA filed a petition for a writ of mandamus in the Superior Court of Guam asking that court to direct the Attorney General to approve a legal services contract between GIAA and a private law firm. The local action involved identical issues to those raised in the district court.

B. *The District Court's Dismissal of the Action*

GIAA filed three motions to dismiss before the district court: (1) for failure to name the proper defendant and join an indispensable party; (2) for lack of subject-matter jurisdiction; and (3) for unsuitability of declaratory relief. The district court's April 1, 2003 order addressed all three motions. The court agreed with GIAA that the proper defendant was GIAA's Board of Directors, and not the Executive Manager of GIAA, but held that pursuant to Federal Rules of Civil Procedure 15(a) and 19(a), appellant could amend his complaint to name the Board.[5]

The motion to dismiss for lack of subject-matter jurisdiction was double-barreled. GIAA first argued that the case should be dismissed for lack of a federal question. The district court distinguished the case relied upon by GIAA, *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086 (9th Cir. 2002), and held that there was federal-question jurisdiction.[6]

---

[4]Our affirmance of the dismissal of appellant's action renders moot his challenge on appeal to the March 28, 2003 ruling.

[5]The court noted, however, that amendment was not necessary as it was dismissing the complaint on other grounds.

[6]The district judge explained:

> plaintiff contends that unlike the *Republican Party* case, this case is not merely an "intra-government power struggle." Rather, this

GIAA's second argument was that even if a federal question were present, dismissal was warranted under the doctrine of federal abstention. The district judge accepted the challenge and boldly ventured into the briar patch of abstention, commenting that although the parties only discussed abstention under *Younger*, he would also analyze abstention under *Burford*.

The judge observed, citing *H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir. 2000), that absent extraordinary circumstances, *Younger* abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. He noted that the case must be dismissed under *Koppel* if the *Younger* doctrine applied. The court found *Younger* abstention proper, explaining that the action in the Superior Court of Guam had progressed further than the federal action, which had only addressed procedural and jurisdictional motions.[7]

The district court proceeded to address abstention under

---

action involves a legal interpretation of the Organic Act, a federal law.

The Court concurs with the plaintiff. As stated by the Supreme Court in *Franchise Tax Bd.*[, 463 U.S. 1, 8-9 (1983),] and by the Ninth Circuit in *Republican Party*, here the vindication of a right under local law necessarily turns on construction of the Organic Act — a federal law. The Attorney General of Guam must seek to restrain an action of a local official relying on his authority created by local law which allegedly conflicts with the authority provided to the Attorney General under the Organic Act.

GIAA did not challenge the existence of subject-matter jurisdiction on appeal. We find the district court's determination of federal-question jurisdiction to be sound.

[7]The court noted that in *Hicks v. Miranda*, 422 U.S. 332 (1975), the Supreme Court stated: "the test is not who made it first to the courthouse but whether 'any proceedings of substance on the merits have taken place in the federal court.' " *Id.* at 349.

Burford, noted that this doctrine allows federal courts to decline to rule on an essentially local issue arising out of a complicated state regulatory scheme, and dismissed the case. The court also dismissed the action as unsuitable for declaratory relief, observing that the Declaratory Judgment Act, 28 U.S.C. § 2201, is deliberately cast in terms of permissive, rather than mandatory, authority. Citing our statement concerning *Burford* abstention in *Gov't. Employees Insurance Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (en banc), the district court declined to exercise its discretionary jurisdiction under the Act because there was an ongoing parallel action in the Superior Court of Guam.

On April 28, 2003, appellant properly invoked our appellate jurisdiction under 28 U.S.C. § 1291 by filing a timely notice of appeal from the district court's dismissal of his action. GIAA filed a cross-appeal.[6]

Thereafter, the superior court issued a final judgment in favor of GIAA. Appellant appealed to the Supreme Court of Guam, which issued an opinion on February 8, 2005. *A.B. Won Pat Guam Int'l Airport Auth. v. Moylan*, 2005 WL 291577 (Guam Feb. 8, 2005). The Supreme Court of Guam held that appellant's common law powers and duties could be adjusted by the Guam Legislature and that "Title 12 GCA § 1108(a) and (c) and Title 5 GCA § 30109 are valid exercises of the Legislature's power to remove the common law power of the Attorney General to act as legal counsel to represent the interests of GIAA, and do not violate the Organic Act." *Id.* at *18. Appellant filed a petition for certiorari to the United States Supreme Court from the opinion of the Supreme Court of Guam.

[6]The only issue raised by GIAA on its cross-appeal was whether the district court abused its discretion in provisionally allowing appellant to amend his action to sue the real party in interest, GIAA's Board. As we affirm the district court's dismissal of appellant's action, we do not consider GIAA's objections to the provisional allowance of an amendment.

C. *Standards of Review*

[1] In *Green v. City of Tucson*, we confirmed that a district court's grant of abstention under *Younger* is reviewed de novo. 255 F.3d 1086, 1093 (9th Cir. 2001) (en banc); *see also Gilbertson v. Albright*, 381 F.3d 965, 968 (9th Cir. 2004) (en banc). Our review of a district court's decision to decline an action under the Declaratory Judgment Act "is deferential, under the abuse of discretion standard." *Dizol*, 133 F.3d at 1223.

D. *The* Younger *Abstention Doctrine*

In *Green*, we reiterated that:

> Absent "extraordinary circumstances," *Younger* abstention is proper when the following three conditions have been met:
>
> (1) There are ongoing state judicial proceedings;
>
> (2) The proceedings implicate important state interests; and
>
> (3) The state proceedings provide the plaintiff with an adequate opportunity to raise the federal claims.

4255 F.3d at 1091. Here, there is really no question that there were ongoing local judicial proceedings and that those proceedings provided appellant with an adequate opportunity to raise his federal claims. Nor is there any serious doubt that the proceedings implicated important local concerns. Appellant's intent in filing his action for declaratory relief was to void local statutes and actions taken by Guam's agencies in reliance on those statutes.[9] Furthermore, there is no question that

[9]Appellant's argument that there is no "direct interference" was defused by our opinion in *Gilbertson*. 381 F.3d at 977-78 (rejecting "direct interference" as a condition or threshold element of *Younger* abstention).

if the criteria for abstention under *Younger* were met, the district court must dismiss the action.[10] *Koppel*, 203 F.3d at 613.

[2] Thus, the district court's dismissal of appellant's action under the *Younger* abstention doctrine must be affirmed unless the proceedings in Guam's courts were insufficient to trigger the application of the doctrine. The relevant question is whether proceedings in Guam's courts may be treated as "state judicial proceedings" and accordingly, in this case, triggered the application of *Younger* abstention. We conclude that the policies underlying the doctrine, statutory law, and this court's prior decisions support an affirmative response.

1. Purposes Underlying *Younger* Abstention

Justice Black, when first enunciating the *Younger* abstention doctrine, explained the reasons behind the approach as follows:

> One is the basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason . . . is reinforced by an even more vital con-

[10] In *Gilbertson*, we held that in an action of law, as opposed to an action for injunctive or declaratory relief, a stay rather than dismissal is appropriate under *Younger*. 381 F.3d at 981. Appellant's action, however, is for injunctive and declaratory relief.

> sideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 43-44.

[3] The subsequent evolution of the *Younger* abstention doctrine has confirmed that it is based on considerations of equity and comity.[11] Although Justice Black addressed "state functions," his reference to "circumstances peculiar to the English judicial system," and the need to "avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted" reveals that the principle of comity was not solely dependent on the sovereignty of the local court.[12] *Id.* Another critical concern appears to be whether the local court provides the plaintiff with an adequate opportunity to litigate his or her federal claims.

[4] The D.C. Circuit has determined that the District of Columbia's lack of statehood does not bar the application of

---

[11] *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 364 (1989) (stating that *Younger* abstention is based partly on "traditional principles of equity" and also on the "even more vital consideration" of comity); *see also Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626-27 (1986) (reiterating that *Younger* abstention is based on equitable principles and concerns of comity and federalism).

[12] Indeed, the Supreme Court has extended *Younger* abstention to defer to state bar disciplinary proceedings, *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 433-34 (1982), and to state administrative proceedings, *Ohio Civil Rights Comm'n*, 477 U.S. at 628. In these cases, the Court's focus appears to have been on whether the administrative proceedings would be reviewable in a state court that could consider federal constitutional issues.

Younger abstention to proceedings in its local courts. *JMM Corp. v. Dist. of Columbia*, 378 F.3d 1117 (D.C. Cir. 2004). It first noted that the equitable principles underlying the *Younger* abstention doctrine applied in full measure to the District of Columbia. *Id.* at 1121. The court then concluded that all the comity concerns underlying the doctrine "apply with equal force to the District of Columbia," stating:

> Federal court interference with District enforcement proceedings may prevent the District from effectuating its substantive policies and disrupt its efforts to protect interests it regards as important. It will certainly result in duplicative legal proceedings and may be interpreted to reflect negatively on the District's ability to enforce constitutional principles. But just as with a state, there is no reason to presume that the courts of the District cannot be trusted to adequately protect federal constitutional rights. To the contrary, "Congress has created a trial and appellate court system of general jurisdiction for the District separate from the United States courts (of which we are a part) and intended to serve the District in much the same manner as the court systems of the various states." *Madley,* 278 F.3d at 1308.

Id. at 1123.

[5] The application of the policies underlying the *Younger* abstention doctrine to Guam produces the same result. First, in light of the pending action in Guam's superior court, maintaining the federal action would have been duplicative. Second, there was no doubt that the local action provided appellant with an adequate remedy. This was confirmed by the Guam Supreme Court's recent opinion and appellant's petition for certiorari to the United States Supreme Court seeking review of that opinion.[13] Third, the district court's

[13]Appellant's petition for certiorari contains the following explanation of jurisdiction:

retention of appellant's action for declaratory relief would have interfered with Guam "effectuating its substantive policies and [would have] disrupt[ed] its efforts to protect interests it regards as important." *JMM Corp.*, 378 F.3d at 1123. Prior to the 1998 Amendment to the Guam Organic Act, GIAA was authorized to retain independent counsel. The district court action would have interfered with the branches of Guam's government working out the impacts of the 1998 Amendment. Finally, the district court's retention of appellant's case might "reflect negatively" on Guam's ability to enforce federal laws. *Id.* Thus, although we recognize that Guam is not a state,[14] we conclude that Guam's courts may be treated as state courts for the purpose of applying the *Younger* abstention doctrine.

[6] Our determination is consistent with the First Circuit's decision in *Maymo-Melendez v. Alvarez-Ramirez*, 364 F.3d 27 (1st Cir. 2004). The First Circuit held in *Melendez* that the *Younger* abstention doctrine was triggered by local proceedings in Puerto Rico. Thus, the First Circuit implicitly equated Puerto Rico with a "state" for purposes of *Younger* abstention.

The judgment sought to be reviewed was entered by the Supreme Court of Guam on February 8, 2005. This Court has jurisdiction to grant this Petition pursuant to 28 U.S.C.1257(a) as applied to the Territory of Guam by 48 U.S.C. 1424-2. Prior to October 30, 2004, a petition for writ of certiorari from a final judgment of the Supreme Court of Guam would have been filed in the Ninth Circuit U.S. Court of Appeals. Section 22B of the Organic Act of Guam, 48 U.S.C. 1424-2, was amended by Section 2 of Public Law 108-378, 118 Stat. 2206, 2208 (Oct. 30, 2004), which terminated the Ninth Circuit['s] review by certiorari of decisions of the Supreme Court of Guam. While this Court has always been the court of last resort, it is now the only federal court with jurisdiction to review decisions from local Territorial courts of Guam interpreting questions arising under federal law.

[14]*Guam v. Guerrero*, 290 F.3d 1210, 1214, 1216-17 (9th Cir. 2002).

2. Statutory Law

[7] As it did for the District of Columbia, Congress has also enacted legislation concerning Guam that supports treating Guam's courts as if they were state courts. Title 48 U.S.C. § 1424-2 states:

> The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings.

[8] If this statute does not authorize deference to Guam's courts under the *Younger* abstention doctrine, it clearly encourages such deference. The statute provides that the relations between federal courts and Guam's courts should be similar to those between federal and state courts, and abstention appears to fall within the "other matters or proceedings" governed by that relationship. Accordingly, we read 48 U.S.C. § 1424-2 as supporting and encouraging our holding.

3. Ninth Circuit Precedents

[9] Finally, deference to Guam's courts under the *Younger* abstention doctrine is consistent with our prior cases. As long ago as 1988, we recognized that "Congress has specifically required that relations between the federal courts and Guam's local courts be the same as those between the federal and state courts." *Guam v. Yang*, 850 F.2d 507, 510 (9th Cir. 1988) (en banc) overruled on other grounds by *U.S. v. Keys*, 133 F.3d 1282 (9th Cir. 1998) (en banc). In *Western Systems, Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992), this court, while affirm-

ing an injunction against further proceedings in Guam's courts pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283, cited 48 U.S.C. § 1424-2 and observed that "Guam is not a state. However, the principles of federalism which underlie federal-state judicial relations apply equally to federal-Guamanian relations." *Id.* at 868 n.5.

[10] Also, in *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635 (9th Cir. 2003), one of the issues was whether the matter could be removed from the Guam Superior Court to the United States District Court of Guam pursuant to 28 U.S.C. § 1441(d). This statute provides that a "civil action brought in a State court against a foreign state . . . may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(d). We held, citing 48 U.S.C. § 1424-2, that the territorial courts in Guam qualify as "state" courts for the purpose of 28 U.S.C. § 1441(d). *Id.* at 642.

[11] Most recently, following the creation of the Guam Supreme Court, we held that we "apply a deferential standard of review to [the] Guam Supreme Court concerning local law" and also "must take into account Congress' clear intent to allow the Guam Supreme Court to develop Guam's common law." *Haeuser v. Dep't of Law*, 368 F.3d 1091, 1097 (9th Cir. 2004).

[12] We conclude that, consistent with the policies underlying the *Younger* abstention doctrine, Congress's enactment of 48 U.S.C. § 1424-2, and the trend of our opinions, the district court properly deferred to the proceedings in Guam's courts under the *Younger* abstention doctrine.

E. *Appellant's Waiver of Objections to Dismissal Under the Declaratory Judgment Act*

The district court also dismissed appellant's action under the Declaratory Judgment Act, 28 U.S.C. § 2201, as unsuitable for declaratory relief. Appellant's opening brief to this court, however, fails to address this independent ground for dismissal. As appellant does not allege any intervening change in the law that might excuse his failure to raise this issue, we hold that he has waived his right to challenge the dismissal of his action on this ground. *See United States v. Bird,* 359 F.3d 1185, 1189 n.1 (9th Cir. 2004) ("Under the law of this circuit, we decline to consider an issue which was not presented to the district court in a proper motion, or raised as an issue in appellant's opening brief."); *see also Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.,* 752 F.2d 1401, 1404 (9th Cir. 1985) ("[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in the appellant's opening brief.").[15]

F. *Conclusion*

The district court dismissed appellant's action on three separate grounds, and we must affirm the dismissal if any one of the three grounds is sound. We have reviewed de novo the district court's dismissal of the action on the basis of *Younger* abstention and determined that deference to Guam's courts under that doctrine is appropriate. We also affirm the district court's dismissal under the Declaratory Judgment Act because appellant waived his right to challenge this dismissal. In light

[15]We have indicated that we may review an issue that is raised for first time on appeal "(1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law." *Park Sch. of Bus., Inc. v. Symington,* 51 F.3d 1480, 1488 (9th Cir. 1995). None of these three exceptions are present here.

of these determinations, we need not, and do not, consider the merits of the district court's dismissal under the *Burford* abstention doctrine.

AFFIRMED.